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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

CONNECTION DISTRIBUTING CO.,

Petitioner,

vs.

THE HONORABLE JANET RENO,

Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Title 18 U.S.C. §2257 and its implementing regulations require a publisher of constitutionally protected sexually explicit images to obtain photo identification and keep records on anyone depicted in the images and to place a label on every copy of its publications disclosing where these records are maintained. These records must be kept available for inspection by the government at any time. However, petitioner publishes magazines which cater to "swingers" - individuals who believe in complete sexual freedom between adults. These magazines contain sexually explicit personal messages submitted by individuals and couples who embrace this lifestyle and communicate with one another through these messages. With the implementation of the statute, these individuals must identify themselves to the federal government before they publish their messages. This they will not do, and as a direct consequence of the statute, an entire body of speech is being silenced - -

1. Do the statute and implementing regulations, as applied to petitioner and its subscribers, violate the First Amendment right to publish anonymously, recognized by this Court in *McIntyre v. Ohio Election Commission*, 514 U.S. 334, 115 S.Ct. 1511 (1995) and chill and abridge the right of freedom of speech in the same way as the statute struck down in *LaMont v. Postmaster General*, 381 U.S. 301, 85 S.Ct. 1493 (1965)?

2. Did the court of appeals misapprehend First Amendment law when it held that a statute regulating constitutionally protected speech that, as applied, has the effect of completely suppressing a

category of speech posing no significant risk of the harm the statute was designed to avoid, is nevertheless narrowly tailored and does not burden more speech than necessary?

3. Is the court of appeals' holding that the requirement that a regulation of speech leave open ample alternative avenues of communication "... does not mean that there must be a channel where [petitioner] and its readers can express themselves in precisely the same manner as before the regulation" and is satisfied on the theory that petitioner can simply express a different message than the one it wants to communicate completely at odds with this Court's interpretation of the First Amendment?

4. Do the statute and implementing regulations, as applied to petitioner and its subscribers, impose a prior restraint on protected expression, abridge freedom of speech and abridge freedom of association in violation of the First Amendment?

LIST OF PARTIES

The parties to the proceedings in the lower court were Connection Distributing Company as appellant and the Honorable Janet Reno as appellee. Mello International Inc., Robyn, Inc. and Lola Mae, Inc. are parent companies of petitioner. Petitioner has no subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Connection Distributing Company respectfully petitions for a Writ for Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Sixth Circuit denying petitioner's Petition for Rehearing and Suggestion for Rehearing *en banc* is set forth in the Appendix at App. 52. The Opinion of the Court of Appeals for the Sixth Circuit, reported at 154 F.3d 281 (6th Cir. 1998), is set forth at App. 1. The Opinion and Order of the United States District Court for the Northern District of Ohio denying petitioner's Motion for Preliminary Injunction is set forth at App. 31-42. The Opinion and Order of the District Court granting petitioner's Motion for Injunction pending appeal is set forth at App. 43-47. The Opinion and Order denying petitioner's Motion for a Temporary Restraining Order is set forth at App. 48-51.

JURISDICTION

The Opinion and Order of the United States District Court for the Northern District of Ohio denying petitioner's Motion for Preliminary Injunction was entered on January 16, 1997. The Opinion and Order affirming that decision by the Sixth Circuit Court of Appeals was entered on August 13, 1998. The Order by the Sixth Circuit denying petitioner's Petition for Rehearing and Suggestion for Rehearing *en banc* was denied on October 22, 1998. This petition is being filed within 90 days of the rehearing denial order. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(l).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution is reprinted in the Appendix to this Petition at App. 53. Title 18 U.S.C. §2257 is reprinted at App. 54-58, and the relevant regulations, 28 C.F.R. 75 *et seq.* are reprinted at App. 59-65.

STATEMENT OF THE CASE

Petitioner, Connection Distributing Company, seeks relief from the unconstitutional application of Title 18 U.S.C. § 2257 to Petitioner and its readership. This statute, as applied to Petitioner, has eliminated an entire avenue of constitutionally protected speech.

Connection published several regional and national magazines directed towards people who participate in what is referred to as the swinging lifestyle. The publications included sexually explicit messages submitted by people in this community, who are overwhelmingly between the ages of thirty and fifty. The personal messages are placed in Petitioner's publications for a fee and constitute the means by which persons who subscribe to the belief that a healthy sexual outlook does not foreclose relationships with other partners communicate with and meet one another. Frequently, the personal messages published in Petitioner's magazines include sexually explicit photographs submitted by individuals or couples wishing to meet partners who share their beliefs and interests. The magazines published by Petitioner are the primary forum for persons who engage in a sexually free lifestyle to communicate with one another.

The swinging lifestyle, while unquestionably controversial and unquestionably a minority point of view, is also most definitely a belief system which cannot be dismissed as a series of casual sexual encounters between strangers. The uncontroverted testimony presented in the case clearly demonstrates that this is a philosophy which is extremely important to its participants. Individuals who subscribe to this lifestyle do so in spite of the stigma which is attached to it and the potentially devastating personal effects which could arise from the revelation that they are members of this community. Petitioner's publications are geared towards the various aspects of living this lifestyle and the issues which arise as a result.

Title 18 U.S.C. §2257 and its implementing regulations require, on penalty of a prison term of up to two years and/or a hefty fine, that Petitioner demand photo identification of all those who wish to publish a sexually explicit photograph in its magazines and that Petitioner make available a copy of that photo identification for inspection by the government at all reasonable times. The recordkeeping provisions state in relevant part:

> (a) Whoever produces any book, magazine, periodical, film, videotape, or other matter which--
>
> (1) contains one or more visual depictions made after November 1, 1990 of actual sexually explicit conduct; and
>
> (2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported

or is intended for shipment or transportation in interstate or foreign commerce;

shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

(b) Any person to whom subsection (a) applies shall, with respect to every performer portrayed in a visual depiction of actual sexually explicit conduct --

(1) ascertain, by examination of an identification document containing such information, the performer's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations;

(2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name; and

(3) record in the records required by subsection (a) the information required by paragraphs (1) and (2) of this subsection and such other identifying information as may be prescribed by regulation.

(c) Any person to whom subsection (a) applies shall maintain the records required by this section at his business premises, or at such other place as the Attorney General may by regulation prescribe and shall

make such records available to the Attorney General for inspection at all reasonable times.

The statute also imposes a labeling requirement. Each publication containing a qualifying visual depiction must have a label affixed to each and every copy carrying a statement describing where the records with respect to the identity of the depicted performers are located. 18 U.S.C. §2257(e)(1). 28 C.F.R. 75 *et seq.* specifies precisely what types of identification are acceptable, what information the labels must contain and how the records are to be kept. The putative purpose of this statute, as advanced by the Attorney General's Commission on Pornography who first proposed it, was to alleviate the difficulty for law enforcement in determining the age of youthful-looking models. See, 1 Attorney General's Commission on Pornography, *Final Report*, 618-20 (July 1986). Ironically, despite its professed goals of assisting law enforcement officials in shutting down child pornography, 18 U.S.C. § 2257 provides that no information obtained from these records shall be used as evidence against any person with respect to any violation of law except for the recordkeeping provisions themselves. 18 U.S.C. §2257(d)(1).

However, the Petitioner does not produce magazines or videos involving models of the kind that the Attorney General's Commission had in mind. The uncontroverted evidence in this case showed that Petitioner publishes pictures of real people who are not models, are not paid to perform, but simply subscribe to an alternative lifestyle. They are husbands and wives in their thirties, forties, fifties, and even older. They do not earn their living by acting in adult films, but rather come from all professions, all strata of society, and are communicating messages of vital importance to other

individuals who share their views. However, because they are average citizens, their fear of exposure will not allow them to provide their photo identifications to the government in order to publish their message. This became clear when the statutory mandates demanding photo identification and labeling dried up what was once a free and unfettered flow of protected expression into nothing more than a sporadic trickle.

Essentially, Petitioner had little to publish and, just as importantly, its readers and subscribers lost the only forum in which they could safely communicate with one another.

Petitioner therefore filed suit in the United States District Court for the Northern District of Ohio seeking a judgment declaring 18 U.S.C. §2257 and regulations promulgated thereunder, unconstitutional as applied to Petitioner and its subscribers and enjoining the Attorney General from enforcing the statute and regulations against it.

A. The Evidence

On April 8, 1996, the district court convened an evidentiary hearing on Petitioner's motion for a preliminary injunction against the enforcement of 18 U.S.C. §2257. The evidence adduced at that hearing, uncontroverted by the government, clearly demonstrated the devastating effect that 18 U.S.C. §2257 has had on the Petitioner's First Amendment rights. As its first witness, Petitioner called Patricia Prementine, the editor of the magazines published by Petitioner Connection Distributing Company. (TR 3-4).

Prementine testified that she had been the editor of Petitioner's magazines for the past twelve years. (TR 4). Petitioner's publications, Prementine explained, are focused

on people who believe in the philosophy of sexual freedom known as swinging. In Prementine's words, swinging is:

> an alternative social and sexual lifestyle comprised mostly of mature adults who believe in sexual freedom and do not believe in sexual monogamy. They allow their partners the freedom to experience sexual relationships with others. (TR 4).

For the most part, persons who participate in swinging are married and have been together for a number of years. The majority of couples are thirty to fifty years old. (TR 9).

Prementine described Petitioner's magazines as personal contact magazines which offer educational and informational materials to persons who share the same sexual philosophies and beliefs. (TR 4). They feature a variety of messages from their readership -- many of which include sexually explicit photos. (TR 5). The magazines also contain video reviews, book reviews, editorials on issues concerning swingers and feature stories. *Id.*

Prementine testified that privacy and confidentiality are fundamental to the swinging lifestyle. (TR 10). Swingers desire to keep this aspect of their sexual beliefs and philosophy private because they fear that their communities, their employers, their neighbors and their families will reject them upon learning of their controversial lifestyle. (TR 10). Prementine recounted several personal experiences in which she observed adverse consequences when the revelation was made that someone was a swinger -- such as job loss and rejection by neighbors. She further testified that: "[M]ost people I know are so afraid that if the government would find their name in our records, that they just can't trust that that

information would not be made public." (TR 11).

Prementine explained that an important part of the messages placed in Petitioner's publications is the photos which accompany them. While some messages include photos with persons simply in the nude, costumed or in street clothes, others feature individuals or couples engaged in actual sexually explicit conduct. (TR 5). Prementine described the significance of the type of photo accompanying the written text:

> I believe there is a very big difference [between messages with explicit photos and messages with non-explicit photos] because the type of photograph that a couple wishes to submit really says a lot about their interest, what turns them on. . . . [I]t shows their sincerity and commitment to the lifestyle and it helps attract the types of responses that they would like to receive from their message being in our magazine. (TR 13-14).

Prementine testified that Petitioner has always treated the personal background information of those who placed or answered messages "with utmost discretion and confidentiality." *Id.* She explained that:

> Connection's reputation really has been built over the last 20 years on the fact that our readership knows that any information we have is confidential. (TR 13).

Those interested in responding to a sexually-explicit message sent their responses to Petitioner who for a fee forwarded the response on to the person who had placed the message. In that way, Petitioner allowed its readership to engage in

anonymous expression.

Beginning in January 1995, that all changed, however, when Petitioner began to take pains to notify its readership of the new disclosure requirements imposed by 18 U.S.C. §2257.[1]

Prior to passage of 18 U.S.C. §2257, Petitioner required anyone wishing to place a communication in its magazines to sign an ad form assuring Petitioner on penalty of perjury that he or she was at least 21 years of age -- three years older than the age of majority. (TR 17). Prementine testified that she personally reviewed all submissions to Petitioner. (TR 18). If a question arose regarding an individual's age or name, Prementine would direct that the submission be returned and necessary verification be forthcoming. (TR 19).

In January 1995, Prementine testified, prior to the government's enforcement of 18 U.S.C. § 2257, Petitioner sent a mailing to its readership informing it about 18 U.S.C. §2257 and the requirements it would impose upon those who wished to place an explicit photo message in Petitioner's magazines. (TR 23). Specifically, Petitioner advised those persons who wished to place explicit photo messages in its magazines that they would now be required by law to produce photo identification as well as a list of all names by which they were known. (TR 23-24).

Petitioner found that its January 1995 notice was ineffectual in getting people to respond to the new requirements that would soon be enforced. So in July 1995, Petitioner sifted through its publication files and cut out any explicit photo ad

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1 As a consequence of other litigation not involving petitioner, enforcement of §2257 did not begin until July of 1995.

for which it was required to demand identification under 18 U.S.C. §2257. (TR 26). In its files, Petitioner found 466 messages that required further identification in order to allow it to continue publishing those messages under 18 U.S.C. §2257 restrictions. Petitioner returned the ads and again informed the individuals of the statute's requirements. As incentive to achieve compliance, Petitioner offered to provide a free ad and included a self-addressed, stamped envelope. *Id.* Petitioner mailed 466 letters seeking identification in July 1995. At the time of hearing, April of 1996, it had received only 30 photo ID's back from this mailing. (TR 27).

The general response of those seeking to place sexually explicit photo messages in Petitioner's publications was equally abysmal. From July of 1995 to March of 1996, Petitioner received only a total of 137 photo messages with proper identification, which were to be distributed among 34 magazine issues. (TR 27-28). Prior to its compliance efforts with 18 U.S.C. §2257, Petitioner would generally receive 100 to 200 sexually explicit messages for each issue it produced. (TR 28). Prementine testified, as editor of Petitioner's magazines for twelve years and as someone involved with the swinging lifestyle for twenty-three years, that the decline in messages was the direct result of 18 U.S.C. §2257. (TR 28).

As a result of the drastic decline in sexually explicit photo messages, Prementine testified that it was increasingly difficult to continue to publish. She explained:

> [It's] pretty impossible to put out the number of magazines that we do when we don't even have five new ads per book, and because of that we have been forced to drop two of the publications of the eight we have here, and we are considering dropping two more. (TR

29).

She testified that Petitioner could not continue to publish magazines with such a small number of messages coming in. (TR 32).

Prementine also testified about the sacrifices in quality forced by the decline in messages. The magazines become comprised of excessive fillers -- commercial ads, promotional messages, book and video reviews. Prementine also testified that much of the color had been cut out of the magazines. (TR 30).

The other witness called by Petitioner Connection Distributing was Robert L. McGinley. Dr. McGinley has had a lengthy academic and business career focusing on the swinging community and lifestyle. (TR 127). He holds a Masters and Doctorate Degree in counseling psychology, (TR 126), and has co-authored a book titled, *The Other Americans*, with Dr. Edgar Butler, Chairman of the Department of Sociology at the University of California, Riverside Campus. (TR 133). McGinley has also written numerous articles for national magazines, has appeared on several hundred television and radio programs on the subject of "swinging," and has had personal contact with swingers throughout the country for the past twenty to twenty-five years. Since 1969, he has operated businesses that have sponsored conventions, social events, tours and directories to facilitate those interested in learning about or engaging in the swinging lifestyle. (TR 125, 131-32). Because of his involvement and experience with the swinging community, McGinley is recognized as a knowledgeable and authoritative figure on the swinging lifestyle.

McGinley provided a profile of the swinging community.

He estimated that three million people engage in swinging. (TR 137). Ninety percent of those involved in swinging, according to McGinley, are more than thirty years old. (TR 138). McGinley explained why that is so:

> Later on, once people's marriages and families are set, the couple has more of a tendency to look for other things and to look outside erotically. These are the people that tend to become more involved in swinging, which is why the great majority of them -- this may be a surprise to people -- would be from the age of 30 on up. More than that, when people become involved in swinging, they tend to stay involved in swinging as they get older, so we find people today well into their 70's involved in swinging. (TR138).

Consistent with this analysis, McGinley testified that he has never heard of nor ever had personal knowledge of a minor involved in swinging. (TR 139). Indeed, McGinley testified that it is rare for someone between the ages of 18 and 21 to be involved in swinging. *Id.*

Dr. McGinley testified, as did Ms. Prementine, that privacy and confidentiality are of paramount importance in the swinging lifestyle. (TR 139). McGinley explained:

> They are fully aware that their lifestyle is a minority lifestyle and that their beliefs are not shared by the majority of our society, and so to be pointed out in some manner as sexual deviants or whatever society may wish to call them, they are fearful that that could cause them to be ostracized from neighborhood, from family, from possible job loss. (TR 139-40).

One of the greatest fears confronting swingers is that their lifestyle will be exposed through government intervention or action. (TR 140).

McGinley testified that he was familiar with the requirements imposed by 18 U.S.C. §2257. (TR 141). In his opinion, based on his background, experience and knowledge of the swinging community, the vast majority of swingers will refuse to comply with the photo identification requirement requisite to publication of their sexually explicit photo messages. (TR 142). McGinley testified:

> It is my opinion that the great majority -- a few may comply, but the great majority will not comply. They will either send the photographs to the publication hoping it's going to be printed, or if they are confronted with you must provide the photo ID, they simply will not do so, and they will not do so regardless of any assurances that the information will not be used to harm them. They simply will not trust that statement. (TR 142).

McGinley reiterated that swingers are fearful that people will learn of their minority lifestyle and as a consequence, they will suffer "negative effects upon themselves, their family, their ability to earn income." (TR 143).

McGinley testified about the importance of a sexually explicit photo message as a mode of communication in the swinging lifestyle:

> An explicit photograph carries information about that person or that couple that mere words cannot portray.

> It says this is us, this is what we look like, this is who we are, and very clearly, this is what we are interested in. It would be difficult to portray that information in any other manner. (TR 164).

He further testified that he knew of no substitute for a sexually explicit photo message; rather he stated that "those photographs are a very definite expression of [the swingers'] sexual makeup and of their lifestyle." (TR 165).

The government presented the testimony of a single witness, Dr. Francis Michael Anthony Biro. Dr. Biro is the Director of Clinical Affairs in the Division of Adolescent Medicine, Children's Hospital Medical Center in Cincinnati, Ohio. (TR 70). Dr. Biro's primary mission in this case as assigned to him by the government was to sift through issues of Petitioner's sexually explicit magazines to find photographs depicting minors using a rating system of various stages of pubertal development used in adolescent medicine. (TR 84). In performing that assignment, Dr. Biro confirmed by scientific finding Petitioner's testimony. Dr. Biro admitted that, by far, the vast majority of photographs he examined, depicted persons in their 30s, 40s and 50s and did not require photo identification to establish that they were older than the age of majority. (TR 115). In Dr. Biro's written expert report to the government and later in deposition, Dr. Biro was unable to identify a single person depicted in a sexually explicit photo as being under the age of majority. (TR 115). At hearing, however, Dr. Biro tried to change his testimony and claimed that he had identified three photographs that depicted persons under the age of eighteen. (TR 87) Dr. Biro's credibility was severely impeached by his own prior inconsistent statements and his admission that when he had first embarked on his examination of the magazines, he had mistakenly believed the age of majority to

be 21. Indeed, the district court appears to have given no weight to Biro's testimony. App. at 37-38.

On January 16, 1997, the district court issued its ruling denying petitioner's motion for a preliminary injunction on the grounds that Petitioner had not established a likelihood of success on the merits of its constitutional challenges to the statute and regulations. App. at 39.

The Petitioner filed a timely notice of appeal in the Sixth Circuit Court of Appeals on January 21, 1997. On January 24, 1997, Petitioner filed a motion for injunction pending appeal pursuant to Rule 62 of the Federal Rules of Civil Procedure, requesting that the district court issue an injunction restraining the Attorney General and her officers, agents, employees, subordinates, attorneys and all persons in active concert or participation with them from enforcing 18 U.S.C. §2257 and its implementing regulations against it during the pendency of the appeal. Based on the record, the district court found that the case involved serious and substantial legal issues and that Petitioner would suffer irreparable injury without injunctive relief pending appeal, and therefore granted Petitioner's motion. App. at 44.

Petitioner's appeal to the Sixth Circuit was argued on February 6, 1998. On August 13, 1998, the court filed its opinion, in which it affirmed the district court's ruling. App. at 1. On appeal, the panel hearing the case first determined that the statute and its implementing regulations were content neutral[2] and therefore subject to the intermediate level of

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2 Connection does not concede that the statute is content neutral. To the contrary, it maintains that the statute, on its face, draws boundaries between prohibited and permitted speech based on content and should be subject to (continued...)

scrutiny. App. at 17-18. It found that the statute did not burden substantially more speech than necessary and left open alternative avenues of communication. App. at 20-21. Also, it rejected plaintiff's right to publish anonymously. App. at 24. Accordingly, the panel affirmed the decision. In short, the panel upheld as applied a statute which was shown by unrebutted evidence to have the clear effect of silencing constitutionally protected speech depicting sexual images. Petitioner filed a motion for rehearing with a suggestion for rehearing *en banc* which was denied on October 22, 1998. App. at 52. A motion to Stay the Mandate Pending Petition for Writ of Certiorari was filed with the Sixth Circuit on October 29, 1998. That motion was denied on November 5, 1998. On November 6, 1998, a Motion to Stay the Mandate was filed with Justice Stevens of this Court, which was denied on November 9, 1998.

REASONS FOR GRANTING THE WRIT

1. An Important Question Is Presented as to Whether The Statute And its Implementing Regulations, as Applied to Petitioner and its Subscribers Violate the First Amendment Right to Publish Anonymously, Recognized by this Court in *McIntyre V. Ohio Election Commission*, 514 U.S. 334, 115 S.Ct. 1511 (1995) and Chill and Abridge the Right of Freedom of Speech in the Same Way as the Statute Struck Down in *LaMont V. Postmaster General*, 381 U.S. 301, 85 S.Ct. 1493 (1965)?

In *McIntyre v. Ohio Elections Commission*, 514 U.S.334, 115

2(...continued)
strict scrutiny. *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989).

S.Ct. 1511 (1995), this Court announced that an author's decision to publish constitutionally protected expression without disclosing his or her identity was a right protected by the First Amendment. The Court held:

> Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.

McIntyre, 115 S.Ct. at 1516. The speaker does not have to explain his desire to remain anonymous. A person may be "motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." *Id.* These are precisely the same fears that have motivated Petitioner's subscribers to censor or silence altogether their own constitutionally protected expression. Just as any political speaker expressing an unpopular but constitutionally protected message may justifiably fear retaliation, so do Connection's subscribers, who profess a belief in a completely sexually free lifestyle, fear social ostracism or worse. The statute as applied to Petitioner, therefore, places a noose around the right to publish anonymous sexually explicit expression, even though that expression is protected by the First Amendment.

Nor, contrary to the Sixth Circuit's conclusion, is the right to publish anonymously unabridged by 18 U.S.C. §2257 because Petitioner's subscribers need only notify the government that they are swingers, rather than the public at large. The opinion by the court of appeals states that "[a]ll that has changed is that documentation of age is required, and this

information must be made available to the government." App. at 24. Indeed, with this additional requirement, everything has changed, as witnessed by the fact that Petitioner has shut down two magazines, and the number of sexually explicit messages, which before the regulation was more than enough to fill each issue, has all but dried up.

The fact that disclosure is to the government alone is of no greater comfort to this Petitioner's subscribers than it was to the petitioner in *LaMont v. Postmaster General*, 381 U.S. 301, 85 S.Ct. 1493 (1965), who, by federal statute had to give his name to the Postmaster General in order to receive Communist literature through the mail. What this Court said in that case, striking down on First Amendment grounds the statute at issue, could just as easily be said about 18 U.S.C. §2257, as applied to Petitioner's subscribers:

> The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like school teachers who have no tenure might think that they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as "communist political propaganda."

Id. at 307. *See also, Denver Area Telecommunications Consortium v. FCC*, 518 U.S. 727, 116 S.Ct. 2374, 2391 (1996) ("[T]he written notice requirement will further restrict viewing

by subscribers who fear for their reputations should the operator, advertently or inadvertently, disclose the list of those who wish to watch the patently offensive channel.")

2. **An Important Question Is Presented As To Whether A Statute Regulating Constitutionally Protected Speech That, as Applied, Has the Effect of Completely Suppressing a Category of Speech Posing No Significant Risk of the Harm the Statute Was Designed to Avoid, Is Nevertheless Narrowly Tailored and Does Not Burden More Speech Then Necessary, As the Court of Appeals Held.**

Title 18 U.S.C. §2257 as applied to the Petitioner has the undisputed effect of entirely eliminating a category of constitutionally protected speech. In its opinion, the court of appeals identified the purpose of the statute as follows:

> The stated purpose of the original Child Protection and Obscenity Enforcement Act of 1988, which §2257 amended, was to alleviate the difficulty for law enforcement officers in ascertaining whether an individual in a film or other visual depiction is a minor for the purpose of combating child pornography. *See* 1 Attorney General's Commission on Pornography, *Final Report*, 618-20 (July 1986). The Attorney General's Commission on Pornography reasoned that, because some pornographers deliberately use youthful-looking adult models, there needed to be a statute requiring producers of sexually explicit materials to maintain records of age verification.

App. at 16-17 (Emphasis added.). While the statute's laudable

goal of protecting children may be advanced when it is applied to actors and models, the statute's application to the Petitioner and its subscribers does nothing more than to completely choke off their only means of communication of constitutionally protected sexually explicit speech.

Nevertheless, the court of appeals concluded:

> The provisions are a reasonable attempt to prevent the use of minors in pornographic materials. By requiring that age verification records be submitted and maintained, the provisions do not prohibit the sexually explicit speech at issue or unduly burden the opportunity of Connection and its readers to engage in the expression. App at 21.

In coming to its conclusion, however, the court below held constitutional a statute that has the effect of entirely eliminating a body of constitutionally protected speech involving mature adults expressing a controversial point of view. This cannot be reconciled with this Court's insistence that a statute must be narrowly tailored and burden no more speech than is necessary.

This Court has consistently held that, while the government's interest in protecting children is clear and important, "that interest does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the government may not reduce the adult population . . . to . . . only what is fit for children.'" *ACLU v. Reno*, 117 S.Ct. 2329, 2346 (1997) (*Denver Area Educ. Telecom. Consortium v. FCC*, 116 S.Ct. at 2393 (quoting *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 128

(1989)). In striking down the Communications Decency Act on First Amendment grounds the Court found:

> In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

Reno, 117 S.Ct. at 2346.

The same may be said of this statute. Title 18 U.S.C. §2257 chokes off an entire category of constitutionally protected expression - - not by the actors, actresses and models who are employed and paid to appear in commercial productions of sexually explicit videotapes and magazines and whose youthful appearances Congress had in mind when enacting 18 U.S.C. §2257 - - but by adult citizens sharing a philosophy and lifestyle who communicate with each other through the sexual images of themselves.

The importance of this question should not be overlooked by this Court, as the Sixth Circuit's opinion has essentially abrogated the First Amendment rights of a minority group of adults to engage in sexually explicit expression, and amounts to censorship of constitutionally protected speech. This decision so clearly departs from this Court's precedent that the Court's review is essential to assure that the rights guaranteed by the First Amendment are fully preserved and protected.

3. An Important Question Is Presented as to Whether the Requirement That a Regulation of Speech Leave Open Ample Alternative Avenues of Communication "... Does Not Mean That There must Be a Channel Where [Petitioner] and its Readers Can Express Themselves in Precisely the Same Manner as Before the Regulation" and Is Satisfied on the Theory That Petitioner Can Simply Express a Different Message than the One it Wants to Communicate, as the Court of Appeals Held.

It is accepted First Amendment doctrine, as expressed by this Court time and again, that the constitutionality of a statute regulating speech depends on whether the statute leaves open alternative avenues of communication. Petitioner argued and proved by uncontroverted evidence that the effect of 18 U.S.C. §2257 as applied was to completely suppress an entire genre of constitutionally protected sexually explicit expression. Yet the lower courts rejected both the argument and the evidence, and the Sixth Circuit concluded that the statute left open acceptable alternative avenues by which Petitioner and its readers could communicate their messages. In reaching this conclusion, the court made two fundamental errors which will be discussed in turn below.

First, the Sixth Circuit reasoned that "the requirement that ample alternative avenues be left available does not mean that there must be a channel where Connection and its readers can express themselves in precisely the same manner as before the regulations." App. at 24. In so holding, the court completely misapprehended the very purpose of the requirement that content neutral regulations of speech leave open ample alternative avenues of communication. The

precise purpose of that standard is to insure that the challenged regulation does not entirely suppress the speech at issue but rather allows the precise message to be communicated at some other time and place.

This Court made it clear in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925 (1986), and *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 101 S.Ct. 2559 (1981), precisely what it meant in fashioning the alternative avenues of communication test of a content neutral regulation. In *Renton*, the Court made it clear that there had to be some place available to show constitutionally protected sexually explicit films. The Court did not offer as a solution that adult theatres show mainstream films, nor did the location, even an undesirable one, change the intended message. Similarly, in *Heffron*, the fact that the petitioners could only prosthelytize and solicit contributions from the confines of a booth at a fair did not change the group's message. In neither *Renton* nor *Heffron*, did the speaker's message itself change with the limitations of time, place and manner. The view that 18 U.S.C.§2257 may survive a constitutional attack even if it has the effect of altogether eliminating Connection's right to publish the precise constitutionally protected sexual images of its choice is at complete odds with this Court's interpretation of the First Amendment.

The second fundamental flaw is the lower court's suggestion that in order to avoid the suppression of protected speech as effected by 18 U.S.C. §2257, Petitioner should simply change the message that it wishes to express. According to the Sixth Circuit opinion, there are "numerous reasonable alternative avenues of communication available for sexually

explicit expression." App. at 25 (citations omitted). As examples, it suggested:

> Undocumented sexually explicit expression is permitted if the acts of sexual conduct are simulated or do not otherwise fall within the proscriptions of the Act. Obviously, documentation is not required for photographs of subscribers who are merely nude, fully clothed, or submit text only messages. Connection's subscribers may also make use of its voice mailboxes for "swingers" and its service on the Internet.

Id. These suggestions are not alternative avenues of communication for a sexually explicit message. This Court has never upheld a regulation of protected speech that requires a speaker to say something different from what he or she wants to say. Rather, whenever this Court has sustained a regulation of protected speech, it was precisely because alternative avenues for expressing the precise message remained. *Ward v. Rock Against Racism*, 491 U.S. 781, 802 (1989); *Renton*, 475 U.S. at 53; *Frisby v. Schultz*, 487 U.S. 474, 483-84 (1988); *see also Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93 (1977).

In short, the Sixth Circuit analysis is at war with First Amendment doctrine. This Court in *Cohen v. California*, 403 U.S. 15, 26, 91 S.Ct. 1780, 1788 (1971) explained the importance of allowing expression to be communicated -- free of regulation of its precise content:

> We cannot indulge the facile assumption that one can forbid particular words without running a substantial risk of suppressing ideas in the process . . . . Much

> linguistic expression serves an oral communication function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

The same can be said with even greater force of the visual messages at issue here. *See, Cardtoons v. Major League Baseball Players*, 95 F.3d 959, 971 (10th Cir. 1996) ("restrictions on the words or images that may be used by a speaker, therefore, are quite different than restrictions on time, place or manner of speech.")

To say that 18 U.S.C. § 2257 offers ample alternative avenues of communication because Petitioner may simply publish <u>different</u> expression which does not require compliance with the statutory disclosure requirements, "no more answers the First Amendment concerns here than to suggest that Paul Robert Cohen could have worn a jacket saying, 'I Strongly Resent the Draft.'" *International Olympic Committee v. San Francisco Arts & Athletes*, 789 F.2d 1319, 1321 (9th Cir. 1986) (dissent from denial of petition for rehearing), *aff'd* 483 U.S. 522, 107 S.Ct. 2971 (1987).

Review on certiorari is necessary because the Sixth Circuit's application of the alternative avenue of communication requirement is so at odds with this Court's precedent that its decision should not be allowed to stand.

4. **An Important Question Is Presented As To Whether 18 U.S.C. §2257 And Its Implementing Regulations As Applied To Petitioner And Its Subscribers Constitutes A Prior Restraint On Protected Expression.**

Petitioner is in possession of a large quantity of constitutionally protected sexually explicit images that it wishes to publish. These images are of persons in their thirties, forties and fifties. Yet solely by force of the statute, Petitioner is forbidden and restrained from ever publishing these images because it is unable to acquire the necessary identification from those individuals who are portrayed in them. The statute is thus restraining the publication of constitutionally protected expression, thereby functioning as a prior restraint.

This Court has consistently held that any system of prior restraint on protected expression bears a heavy presumption against its constitutional validity, and the Court has struck down prior restraints on protected expression as grave affronts to First Amendment rights. Petitioner argues that 18 U.S.C. §2257 constitutes as much a prior restraint as any that has been found by this Court, and as such the Court should closely examine the statute's constitutionality as applied to Petitioner.

The particular aspect of a prior restraint that makes it so insidious, is its complete and absolute suppression of speech without regard to whether or not the speech is constitutionally protected. For, if a party engages in speech in derogation of the restraint (whether without a license, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226, 110 S.Ct. 596, 605 (1990); in defiance of a court order, *Near v. Minnesota*, 283 U.S. 697 (1931); or as here, without obtaining the requisite identification or placing

the requisite label on the materials), it is no defense to the government's efforts to sanction or punish him, that the speech at issue was protected by the First Amendment. The crime is not based on the unprotected nature of the speech, but rather on the non-compliance with the law regulating speech.

Congress, by enacting 18 U.S.C. §2257, has established a prior restraint akin to that inherent in a licensing scheme. Rather than filling out the proper form seeking a license before it can engage in publishing expression, a publisher must first gather sufficient identification from the individuals who have submitted a sexually explicit photograph for publication, maintain the identification in its place of business, and place a conforming label on its publication identifying the location of the required records before it can legally publish its constitutionally protected expression. And, as under a licensing scheme, if the publisher fails to meet the statutory record keeping and labeling demands before it publishes the sexually explicit depictions, its stands in jeopardy of criminal sanctions. It is no defense to a prosecution under 18 U.S.C. §2257 that the sexually explicit image was a photograph of two 60-year olds making love published in a medical text on human sexuality. If the requisite photo identification has not been obtained and maintained for both persons and the requisite label has not been affixed, then the publisher of that image has violated 18 U.S.C. §2257 and is subject to punishment by fine and/or incarceration--just as a person who publishes constitutionally protected speech without a license is thereafter sanctioned for speaking without having first obtained a permit.

The court of appeals view that 18 U.S.C. §2257 did not impose a prior restraint on speech, but rather imposed subsequent punishment, ignored the effect of the statute, *See*,

Near v. Minnesota, 283 U.S. 697 (1931), and failed to take into account the undisputed restraining effect the statute is having currently and in the future on Petitioner's ability to publish constitutionally protected speech. Thus, it is vitally important for this Court to review the Sixth Circuit holding.

5. An Important Question is Presented As To Whether 18 U.S.C. §2257 And Its Implementing Regulations As Applied To Petitioner And Its Subscribers Abridge Their First Amendment Right To Freedom Of Association.

This case also raises an important constitutional question as to whether Title 18 U.S.C. §2257 works an unconstitutional infringement on the associational rights of Petitioner's subscribers. The importance of this aspect of First Amendment rights has been expressed by this Court in decisions such as *NAACP v. Alabama*, 357 U.S. 449 (1958), *NAACP v. Button*, 371 U.S. 415 (1963), and *Brown v. Socialist Workers Party '74 Campaign Committee*, 459 U.S. 87 (1982). These three decisions particularly have recognized the intimidation and harassment that those espousing unpopular beliefs may suffer at the hand of the state, and therefore the vital importance of the privacy rights of the membership.

Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of freedom of speech. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958). This Court recognized that:

> Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

Id. at 462 (citation omitted). Like the associational rights of the members of the NAACP or the Socialist Worker's Party, the associational rights of Petitioner's readership, including those who place sexually explicit communications, depend on full and complete privacy. Revelation of their identity as required by the statute may very well expose them to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *NAACP v. Alabama*, 357 U.S. at 462.

This Court should review the decision by the court of appeals to determine the constitutionality of 18 U.S.C. §2257 as applied to the associational rights of petitioner's subscribers, a discrete group of individuals who share a minority viewpoint and fear reprisals from the government if they are revealed as members of this group.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully urges this Court to grant its petition for a writ of certiorari.

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CONNECTION DISTRIBUTING CO., *Plaintiff-Appellant,*		
v.	>	No. 97-3092
THE HONORABLE JANET RENO, *Defendant-Appellee.*		

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 95-01993 -- John M. Manos, District Judge.

Argued: February 6, 1998

Decided and Filed: August 13, 1998

Before: NORRIS and CLAY, Circuit Judges; BORMAN, District Judge.*

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*The Honorable Paul D. Borman, United States District Judge for the Eastern District of Michigan, sitting by designation.

COUNSEL

ARGUED: J. Michael Murray, BERKMAN, GORDON, MURRAY, PALDA & DeVAN, Cleveland, Ohio, for Appellant. Anne M. Lobell, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D.C., for Appellee. **ON BRIEF:** J. Michael Murray, Lorraine R. Baumgardner, BERKMAN, GORDON, MURRAY, PALDA & DeVAN, Cleveland, Ohio, for Appellant. Anne M. Lobell, Jacob M. Lewis, U.S. DEPARTMENT OF JUSTICE, CIVIL DIVISION, APPELLATE STAFF, Washington, D.C., for Appellee.

OPINION

CLAY, Circuit Judge. Plaintiff-Appellant Connection Distributing Company appeals the denial of its motion for preliminary injunction against the enforcement of 18 U.S.C. §2257 and 28 C.F.R. §75, *et seq.*, on the ground that the statute and its implementing regulations violate the First Amendment as applied to Appellant. For the reasons set forth below, we **AFFIRM** the district court's denial of the preliminary injunction.

I. BACKGROUND

A. Nature of the Case

Plaintiff-Appellant Connection Distributing Company ("Connection") filed this action on September 13, 1995, seeking a judgment declaring 18 U.S.C. §2257 (1994) and 28 C.F.R. §75 (1997), *et seq.*, unconstitutional as applied to Connection and its readers and seeking injunctive relief against

the Honorable Janet Reno in her official capacity as Attorney General of the United States.

Connection publishes and distributes approximately a dozen so-called "swingers" magazines. Connection defines the philosophy of "swinging" as: "an alternative social and sexual lifestyle comprised mostly of mature adults who believe in sexual freedom and do not believe in sexual monogamy." (J.A. at 44.) Connection's magazines contain, in addition to editorials and feature stories, messages placed by persons whose beliefs and philosophies embrace the "swinging" lifestyle. These individuals and couples place and respond to messages in Connection's various magazines. The messages often contain detailed descriptions of the subscribers' bodies and sexual tastes and frequently are accompanied by sexually explicit photographs of the subscribers. Some messages include photographs with persons simply nude or in street clothes, but may feature individuals or couples engaged in sexually explicit conduct. Although some of the magazines allow the subscriber to place his or her address directly beneath the message, the majority of the people submitting messages identify themselves through a code that appears at the beginning of the text of each message. Readers respond by writing to Connection, which charges a fee to forward the response to the message placer.[1] Connection also offers 900 number voice mailboxes for individuals who wish to respond by telephone, as well as an Internet service.

Connection asserts that the labeling and record-keeping

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[1] The terms "subscribers," "advertisers," and "readers" will be used interchangeably to describe those who place messages in Connection's magazines.

provisions of 18 U.S.C. §2257 and its accompanying regulations violate the First Amendment by unconstitutionally suppressing the free speech rights of Connection and its subscribers, by serving as an unlawful prior restraint, and by violating the free association rights of Connection's subscribers. The challenged record-keeping and labeling provisions require anyone appearing in a sexually explicit visual depiction to produce photographic identification and require anyone publishing such a visual depiction to maintain identification records and label the publication as to the location of those records. *See* 18 U.S.C. §2257 and 28 C.F.R. §75 *et seq.* Connection contends that, because anonymity is important to "swingers," these provisions stand as a barrier to those who wish to exercise their free speech rights to place messages and their free association rights to communicate with other "swingers" in Connection's magazines. Likewise, Connection asserts that its right to publish constitutionally protected expression is diminished because of the effect of the provisions on its subscribers and on Connection itself.

B. Legal Framework

Following challenges to the constitutionality of the Child Protection and Obscenity Enforcement Act of 1988, Pub. L. No. 100-690, 102 Stat. 4485, Congress amended the statute through the passage of the Child Protection Restoration and Penalties Enhancement Act of 1990, 18 U.S.C. §2257 (1994) (the "Act" or "Section 2257").[2] Section 2257 is a record-keeping statute that

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[2] Congress amended the record-keeping provisions of the 1988 version of the statute during the pendency of an appeal to the District of Columbia Circuit of a case challenging these provisions brought by a group of librarians and book, magazine, and video publishers, editors, and distributors. *See*

(continued...)

requires all producers of matter containing visual depictions of "actual sexually explicit conduct to create and maintain records of the names and date of birth of the performers portrayed in the depictions. 18 U.S.C. §2257(a), (b) (1994). The Act requires that the records be maintained at the producer's business premises, or as elsewhere permitted by regulations, and that the records be made available "to the Attorney General for inspection at all reasonable times." 18 U.S.C. §2257(c) (1994). In addition, the Act mandates that the producers affix to each copy of material covered by its provisions a statement detailing where the depicted age verification records may be located. 18 U.S.C. §2257(e)(1) (1994).

As defined by the Act, the term "produces" means to "produce, manufacture, or publish," and includes "duplication, reproduction, or reissuing," but does not include "mere distribution or any other activity which does not involve hiring, contracting for managing, or otherwise arranging for the participation of the performers depicted." 18 U.S.C. §2257(h)(3) (1994). A "performer" is defined as "any person portrayed in a visual depiction engaging in, or assisting another person to engage in, actual sexually explicit conduct." 18 U.S.C. §2257(h)(4) (1994). The Act applies only to depictions of "actual sexually explicit conduct," which is defined as: (1) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal sex; (2) bestiality; (3) masturbation; and (4) sadistic or masochistic abuse. *See* 18 U.S.C. §2257(h)(1) (1994) (incorporating definitions of §2256(2)(A)-(D)).

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[2](...continued)
American Library Ass'n v. Barr, 956 F.2d 1178, 1181 (D.C. Cir. 1992).

The Act also provides that no information or evidence obtained from the records shall be used "directly or indirectly" as evidence against any person with respect to any violation of law except for the record-keeping provisions themselves. 18 U.S.C. §2257(d) (1994). Persons violating the Act are subject to fines and imprisonment of up to two years for the first offense, and up to five years (but not less than two) for succeeding convictions. 18 U.S.C. §2257(i) (1994).

The regulations propounded by the Attorney General as required by 18 U.S.C. §2257(b)(3) further define the Act's requirements. The regulations divide producers into two categories, "primary" and "secondary." 28 C.F.R. §75.1(c) (1997). A primary producer is one who "actually films, videotapes, or photographs a visual depiction of actual sexually explicit conduct," *id.* §75.1(c)(1), while a secondary producer "produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues" materials contained such depictions that are "intended for commercial distribution." *Id.* §75.1(c)(2).

The regulations require that all producers maintain records that contain "[t]he legal name and date of birth of each performer, obtained by the producer's examination of an identification document." *Id.* §75.2(a)(1). Those records must include a "legible copy of the identification document examined," *id.*, as well as "[a]ny name, other than each performer's legal name, ever used by the performer, including the performer's maiden name, alias, nickname, stage name, or professional name." *Id.* §75.1(c)(3). A secondary producer is permitted to "maintain records by accepting from the primary producer . . . copies of the records" as long as the secondary producer keeps the "name and address of the primary

producer." *Id.* §75.2(b).[3]

C. Prior Proceeding

In its Complaint of September 13, 1995, Connection sought a declaratory judgment that the Act and its implementing regulations were unconstitutional under the First Amendment, as well as a temporary restraining order[4] and a preliminary and permanent injunction against the enforcement of the Act against Connection.

On April 8 and 9, 1996, the district court convened an evidentiary hearing on Connection's motion for preliminary injunction. At the hearing, Connection presented the testimony of Patricia Prementine, the editor for the past twelve years of the magazines published by Connection. Prementine testified that people who believe in the philosophy known as "swinging" are engaged in an alternative social and sexual lifestyle and "believe in sexual freedom and do not believe in sexual monogamy." (J.A. at 44.) Prementine testified that most "swingers" are married or couples, have been together for a number of years, and are thirty to fifty years old. (J.A. at 49.)

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[3] In *Sundance Associates, Inc. v. Reno*, No. 96-1501, 1998 WL 127112, at *2-3 (10th Cir. Mar. 23, 1998), the Tenth Circuit struck down part of 28 C.F.R. §75.1(c)(4)(iii) to the extent it requires record-keeping by producers who do not hire, manage, or arrange for the participation of the persons depicted. The court concluded that the regulations were impermissible because they were broader in scope than authorized by the Act. *Id.* We need not reach this issue in the instant case, however, because both parties acknowledge that Connection has made no such contention in this suit.

[4] On October 24, 1995, the district court denied Connection's request, filed by separate motion, for a temporary restraining order against the enforcement of the Act. (J.A. at 32)

Prementine estimated that approximately eighty-five to ninety percent of the persons who place ads in Connection's magazines request that their faces be blocked out. (J.A. at 71.) According to Prementine, and based on her personal experiences and contacts with "swingers," privacy and confidentiality are fundamental to the "swinging" lifestyle because the participants fear that their employers, communities, and families will reject them upon learning of their controversial lifestyle. (J.A. at 50-51.) Prementine asserted that, because of these privacy concerns, Connection's publications serve a critical and unique role to those choosing this alternative lifestyle by presenting information about social activities and functions and allowing a means for connecting with others who share their beliefs. (J.A. at 52-53.) Connection also presented the testimony of Robert McGinley as an "expert" on the "swinging" lifestyle.[5] McGinley likewise testified that privacy and confidentiality are very important to "swingers." (J.A. at 179.80.)

Prementine states that prior to the passage of the Act, Connection required anyone wishing to place a message in its magazines to sign a release form assuring Connection that he or she was at least twenty-one years of age. (J.A. at 57.) Prementine personally reviewed all the submissions and, if a question arose regarding an individual's age or name, the submission would be returned and necessary verification

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[5] McGinley has a doctorate in counseling psychology and has co-authored a book on "swinging," written numerous articles, appeared on television and radio programs, operated businesses that have sponsored conventions, social events, tours and directories to assist those interested in learning abut or engaging in the "swinging" lifestyle, conducted surveys and studies of "swingers," and had personal contact with thousands of "swingers" over the past twenty years. (J.A. at 171-76.)

required. (J.A. at 58-59.) Prementine further testified that when Connection began to make efforts in January 1995 to notify its readers of the new disclosure requirements imposed by the Act and send out its revised advertisement forms, the reader response was low, and there was a significant decline in the number of submissions Connection was receiving. (J.A. at 66-68.) Based solely upon her personal experience and her position as Connection's editor, Prementine opined that the decline in messages was attributable to the passage of the Act. (J.A. at 68.)

The government presented the testimony of Dr. Francis Michael Anthony Biro, the Director of Clinical Affairs in the Division of Adolescent Medicine at Children's Hospital Medical Center in Cincinnati, Ohio. Dr. Biro reviewed several issues of Connection's magazines to attempt to find photographs depicting minors by using a rating system of various stages of pubertal development used in adolescent medicine. (J.A. at 124-25.) Dr. Biro testified that the vast majority of the photographs he examined depicted persons in their thirties, forties, and fifties and did not require photographic identification to establish that they were older than the age of majority. (J.A. at 155.) Although Dr. Biro did identify three photographs that he believed depicted persons under the age of eighteen, this testimony conflicted with his earlier deposition testimony, in which he stated that none of the photographs he examined depicted minors. (J.A. at 127, 156-57.)

On January 16, 1997, approximately nine months after the date of the hearing, the district court denied Connection's motion for preliminary injunction. Although the district court's ruling primarily relied on its finding that Connection had not

demonstrated a substantial likelihood of success on the merits, the court also found that the other factors for analyzing a request for a preliminary injunction did not weigh in favor of granting one. (J.A. at 27-30.)

Nonetheless, the district court granted Connection's motion for an injunction pending this appeal of the denial of the preliminary injunction. The district court concluded that, even though there was not a strong likelihood of success on the merits of the appeal, a stay of its order denying the preliminary injunction was warranted both because of the substantial legal questions involved in the case and because Connection would be irreparably harmed, in the form of its potential demise, if it were forced to comply with the statute during the pendency of the appeal. (J.A. at 37-38.) Accordingly, the district court issued an injunction barring the enforcement of the Act against Connection prior to the resolution of this appeal.

II. STANDARD OF REVIEW

In determining whether or not to grant a preliminary injunction, a district court considers four factors: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest. *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 653 (6th Cir.), *cert. denied*, 117 S.Ct. 49 (1996). "None of these factors, standing alone, is a prerequisite to relief; rather, the court should balance them." *Id.* (citations omitted).

An appeals court reviews a challenge to a district court's ruling on a preliminary injunction for abuse of discretion. *Blue*

Cross & Blue Shield Mutual of Ohio v. Blue Cross and Blue Shield Ass'n, 110 F.3d 318, 322 (6th Cir. 1997). "The district court's determination will be disturbed only if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Id.*

When a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor. With regard to the factor of irreparable injury, for example, it is well-settled that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality); *see also Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*). Thus, to the extent that Connection can establish a substantial likelihood of success on the merits of its First Amendment claim, it also has established the possibility of irreparable harm as a result of the deprivation of the claimed free speech rights. *See Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995).

Likewise, the determination of where the public interest lies also is dependent on a determination of the likelihood of success on the merits of the First Amendment challenge because "it is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994); *see also Dayton Area*, 70 F.3d at 1490 ("the public as a whole has a significant interest in . . . protection of First

Amendment liberties"). Furthermore, although the government presumably would be substantially harmed if enforcement of a *constitutional* law aimed at fighting child pornography were enjoined, this determination, too, first requires a review of the merits of the claim.

Accordingly, because the questions of harm to the parties and the public interest generally cannot be addressed properly in the First Amendment context without first determining if there is a constitutional violation, the crucial inquiry often is, and will be in this case, whether the statute at issue is likely to be found constitutional. *Cf. Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458, 460 (6th Cir. 1991) (noting, in its review of injunction requiring placement of menorah in public square, that because harm could be suffered by either party, and the public interest lies in the correct application of First Amendment principles, "our decision must turn on the likelihood of success on the merits").

III. CONSTITUTIONALITY OF SECTION 2257 AS APPLIED TO CONNECTION AND ITS READERS

A. Suppression of Free Speech

As a publisher of magazines containing sexually explicit visual depictions, Connection asserts that its First Amendment rights to publish and distribute constitutionally protected expression, as well as the rights of its advertisers to communicate with each other,[6] have been unconstitutionally

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[6] Connection brings this action on behalf of itself and its advertisers. A litigant may raise a claim on behalf of a third party if the litigant can demonstrate that it has suffered a concrete, redressable injury, that it has a close relation with (continued...)

suppressed as a result of the record-keeping and disclosure provisions of the Act. The protected nature of the expression involved in this case was not challenged before the district court and thus is not at issue. There is the possibility that the sexually explicit photographs published by Connection could be found constitutional because it is well-settled that "[s]exual expression which is indecent but not obscene is protected by the First Amendment," and hence subject to constitutional strictures.[7] *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Furthermore, the Supreme Court specifically has held that "non-obscene, sexually explicit materials involving persons over the age of 17 are protected by the First Amendment." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994). Therefore, the photographs published by

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[6](...continued)
the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 629 (1991). For the reasons explained in Part III.C, we conclude that Connection may properly assert the free speech and free association rights of its readers. *See* discussion *infra* Part III.C.

[7] The standard for determining whether materials are obscene remains the same today as that set forth by the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973):

> "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state of law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.*, at 24, 93 S.Ct., at 2615 (internal quotation marks and citations omitted).

Reno v. American Civil Liberties Union, ___ U.S. ___, 117 S.Ct. 2329, 2345 (1997). Based upon the record and factual scenario before us, we need not decide, and have not decided, specifically whether any of the materials at issue are obscene. However, we will assume, but solely for the purpose of analyzing the record-keeping provisions at issue, that the materials are not obscene.

Connection are protected expression to the extent they feature adults engaged in non-obscene, sexually explicit conduct.[8]

Photographs featuring children engaged in sexually explicit conduct, however, would not constitute protected expression. In *New York v. Ferber*, 458 U.S. 747, 764 (1982), the Supreme Court held that, as long as the activity to be prohibited is adequately defined and limited by applicable state law, child pornography -- defined generally as works that visually depict sexual conduct by children below a specified age -- is not entitled to First Amendment protection. In upholding a statute prohibiting the distribution of child pornography, the Court in *Ferber* noted that States are entitled to greater leeway in the regulation of child pornography because of the State's interest in preventing the sexual exploitation of children and in closing down the distribution network that generates the market for child pornography, which in turn leads to the abuse of children involved in the production of the materials. *Id.* at 757-59. The Court also has upheld a State's right to prohibit even the possession of child pornography. *See Osborne v. Ohio*, 495 U.S. 103, 111 (1990) ("[g]iven the gravity of the State's interests . . . we find that Ohio may constitutionally proscribe the possession and viewing of child pornography").

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[8] This does not mean that use or distribution of these materials would be protected in all contexts. The government presumably could, for example, prohibit the distribution of these materials, even though not obscene, to minors. *See Ginsberg v. New York*, 390 U.S. 629, 636-37 (1968). Additionally, the First Amendment also would not protect the right to engage in the depicted sexual conduct publicly under the theory that the sexual act itself constitutes protected expression. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973). What is relevant for purposes of this case, however, is that the materials published by Connection are protected expression in the context of the record-keeping provisions at issue.

The goal of preventing the sexual exploitation of children undoubtedly is a compelling and important one, which the government not only is permitted but perhaps obliged to pursue. *See Ferber*, 458 U.S. at 757 (finding prevention of the sexual exploitation and abuse of children to be a government objective of "surpassing importance"). Recently Congress has further attempted to fight child pornography through the passage of the Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-26 (codified at 18 U.S.C. §2252A (Supp. II 1996)). This new statute, aimed at curbing the effects of computer technology upon the child pornography industry, broadens the scope of child pornography laws by making it illegal to possess or distribute, electronically or otherwise, child pornography and defining "child pornography" to include visual depictions, however generated or created, that feature minors, have been created or modified to appear to feature minors, or are marketed as featuring minors engaged in sexually explicit conduct. *See* 18 U.S.C. §2252A (Supp. II 1996) (incorporating definition of "child pornography" contained in 18 U.S.C. §2256(8) (Supp. II 1996)).[9]

However, even in the pursuit of the most worthy of goals, the government may not unduly burden free speech. In determining whether the Act inappropriately hinders the

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[9] Recently, this statute has been subjected to constitutional challenge, particularly on the basis that because the statute prohibits sexually explicit visual depictions of persons who only *appear* to be minors, it prohibits constitutionally protected expression. *See United States v. Hilton*, No. Crim. 97-78-P-C, 1998 WL 167255 at *3-4 (D. Me. Mar. 30, 1998) (finding prohibition on pornography with child-like depictions to be content-neutral but striking the definition of "child pornography" on the basis of vagueness); *Free Speech Coalition v. Reno*, No. C 97-0281VSC, 1997 WL 487758 at *4, 6 (N.D. Cal. Aug. 12, 1997) (finding prohibition on child-like depictions content-neutral and sufficiently defined to withstand vagueness challenge).

exercise of the protected speech at issue, it is necessary first to determine whether the Act is content-based or content-neutral because that determination will decide the level of scrutiny.

> The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is justified without reference to the content of the regulated speech.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (citations and internal quotations omitted).

The stated purpose of the original Child Protection and Obscenity Enforcement Act of 1988, which §2257 amended, was to alleviate the difficulty for law enforcement officers in ascertaining whether an individual in a film or other visual depiction is a minor for the purpose of combating child pornography. *See* 1 Attorney General's Commission on Pornography, *Final Report* 618-20 (July 1986) ("Final Report"). The Attorney General's Commission on Pornography reasoned that, because some pornographers deliberately use youthful-looking adult models, there needed to be a statute requiring producers of sexually explicit material to maintain records of age verification. *Id.* at 618. The Commission also concluded that minors deserve special protection from the risks inherent in the production of pornographic materials and, therefore,

individuals should be prohibited from employing, using, persuading, inducing, or coercing any minor to engage in sexually explicit conduct for the purpose of producing any visual depiction of such conduct. *Id.* at 618-19.

The government's goal of preventing child pornography through the record-keeping provisions of the Act clearly is not an attempt to regulate the speech of Connection and its advertisers because of disagreement with the messages they convey. Although the Act does require that the content of speech be examined to determine its applicability, the Act is not directed at the protected speech but rather unprotected conduct -- namely, child pornography -- that may be identified by the speech. Therefore, the fact that publishers or producers of sexually explicit visual depictions are, to some extent, treated differently from other types of producers of visual depictions does not make the Act content-based. *Cf. City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986) (finding that zoning ordinance restricting the placement of adult theaters was aimed at the secondary effects of such theaters on the surrounding community and thus was a content-neutral regulation despite the differing treatment received by adult theater owners as compared to other theater owners); *see also R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 389 (1992) (noting that a "valid basis for according differential treatment to even a content-defined subclass of proscribable speech is that the subclass happens to be associated with particular 'secondary effects' of the speech, so that the regulation is 'justified without reference to the content of the . . . speech'") (citations omitted). Thus, although the Act may not be content-neutral in a technical sense, because it is directed at curbing the secondary effects of the speech and not the speech itself, it is proper to deem it content-neutral for First

Amendment purposes. *See Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir. 1998) (noting that regulations of sexually explicit speech which are aimed at its secondary effects are, in fact, content-based but merely are to be treated as content-neutral). The reason for this difference in treatment is that the Supreme Court has held that although sexually explicit expression is protected by the First Amendment, "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude" than the societal interest in other forms of expression, such as political debate. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality). Accordingly, because §2257 is a regulation aimed at the secondary effects of sexually explicit speech, it is properly analyzed as a content-neutral regulation.

The intermediate level of scrutiny applies to content-neutral regulations that impose an incidental burden on speech. *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994). Under this standard, a government regulation is constitutional if the obligations it imposes are "narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *Ward*, 491 U.S. at 791 (citation and internal quotations omitted).

With regard to the requirement of narrow tailoring, Connection argues that the Act burdens substantially more speech than is necessary to achieve its professed goal of combating child pornography. Although Connection acknowledges that the protection of children is a legitimate and substantial government interest, it claims that the Act's record-keeping provisions unnecessarily diminish the First Amendment rights of adults because the Act's goal is not

furthered by the record-keeping provisions as applied to Connection and its readers.

It is true that the interest of protecting children may not always justify limitations on the First Amendment rights of adults, and the government is not excused from the tailoring requirement merely because the interests of children are involved. In *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 130-31 (1989), the Supreme struck down a total ban on indecent commercial telephone communications as not sufficiently justified by the government interest in preventing minors from being exposed to those messages. In balancing the interests at stake, the Court found that the statute's complete denial of adult access to telephone messages which are indecent but not obscene far exceeded that which was necessary to limit the access of minors to such messages. *Id.* at 131. Similarly, in *Reno v. American Civil Liberties Union*, ___ U.S. ___, 117 S.Ct. 2329 (1997), the Court invalidated provisions of an act designed to protect minors from harmful material on the Internet because the statute unnecessarily suppressed a broad amount of adult speech. *Id.* at 2346-48. Therefore, courts must weight the interests at stake in determining whether a statute impermissibly burdens free speech.

It is alleged by Connection that the vast majority of its advertisers are well over the age of majority. Nonetheless, a universal requirement of age disclosure, regardless of the apparent age of an individual in a visual depiction, is critical to the government's interest in ensuring that no minors are depicted in actual sexual conduct. Although standards based on "obvious" maturity would lead to accurate determinations in many cases, they also would attach an ineffectual subjectivity to the age determination, which was the target of

the Act in the first place. *See Final Report* at 620 ("By viewing a visual depiction, how does one decide if the performer is fourteen or eighteen, seventeen or twenty-one?").

Furthermore, to satisfy the narrow tailoring requirement of the intermediate scrutiny test, a regulation need not be the least speech-restrictive means of achieving the government's interests. *Turner Broadcasting*, 512 U.S. at 662. All that is required for narrow tailoring is that the regulation does not burden substantially more speech than is necessary to further the government's legitimate interest. *Id.* If the government wishes to prevent the sexual exploitation of children through the production of child pornography, application of the record-keeping provisions to all producers of sexually explicit materials is necessary and not unduly burdensome.

In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Supreme Court analyzed a zoning ordinance that prohibited adult motion pictures form locating within 1,000 feet of any residential zone. After noting that the ordinance did not ban adult theaters altogether, but merely put restrictions on their location, the Court upheld the ordinance under the intermediate scrutiny test. *Id.* at 52-54. The Court found that the ordinance represented a valid governmental response to the "admittedly serious problems" created by adult theaters and was not used as a "pretext for suppressing expression" but rather was an attempt to make some areas available for adult theaters and their patrons, while at the same time preserving the quality of life in the community at large. *Id.* at 54 (citations omitted).

The Act, like the ordinance at issue in *City of Renton*, also is a reasonable attempt to balance the free speech interests of

Connection and its readers against the interest of the government in fighting child pornography. Child pornography is an "admittedly serious" problem, and the record-keeping provisions of the Act clearly are not a "pretext for suppressing expression." *See City of Renton*, 475 U.S. at 54. The provisions are a reasonable attempt to prevent the use of minors in pornographic materials. By requiring that age verification records be submitted and maintained, the provisions do not prohibit the sexually explicit speech at issue or unduly burden the opportunity of Connection and its readers to engage in the expression. Because the Act supports the government's interest in fighting pornography, while allowing Connection and its readers to exercise their free speech rights, it satisfies the requirement of narrow tailoring. *See Turner Broadcasting*, 512 U.S. at 662.

Similarly, the Act is not impermissibly overbroad. A statute is overbroad when it includes within its prohibitions activities that are constitutionally protected. *See Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). Although the majority of Connection's readership may not be the object of the Act's focus, the allowance of exceptions to the disclosure requirements -- presumably based on a subjective determination by Connection as to a subscriber's age -- would not promote the Act's goal of eliminating the use of minors in pornography.

Connection also argues that the Act unconstitutionally chills protected speech. A statute may be stricken as unconstitutional under the First Amendment if it has a substantial chilling effect upon protected speech. *See, e.g. Reno*, 117 S.Ct. at 2345 (explaining that the vagueness of the Communication Decency Act and the severity of its criminal

sanctions "may well cause speakers to remain silent rather than communication even arguably unlawful words, ideas, and images"). Connection contends, based primarily on anecdotal evidence and supposition, that the potential of their identifying information being disclosed to the government will chill its advertisers from exercising their right to publish sexually explicit photographs and will result in the self-censorship of their speech.

The Supreme Court "consistently has refused to allow government to chill the exercise of constitutional rights by requiring disclosure of protected, but sometimes unpopular, activities." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 767 (1986) (striking down reporting requirements of Pennsylvania abortion law where records would be available to public), *overruled on other grounds by Planned Parenthood of Southeastern Pa v. Casey*, 505 U.S. 833 (1992). In this case, however, the provisions at issue do not require the disclosure of any information about the subscribers to the public. The Act does not constitute an impermissible "chill" on the exercise of free speech rights because it clearly does not contemplate public release of the information or "raise the specter of public exposure and harassment" of "swingers" who choose to express themselves through Connection's publications. *Thornburgh*, 476 U.S. at 767; *cf. Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 79-81 (1976) (upholding constitutionality of mandatory abortion records that were accessible only to public health officers).

All of the preceding relates to the requirement that a content-neutral regulation of speech be "narrowly tailored." This requirement is satisfied "'so long as the . . . regulation

promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). The Act complies with this requirement and is neither overbroad nor an impermissible chill on free expression because, as explained above, the government's interest in eliminating child pornography would be less effectively promoted without the record-keeping and disclosure requirements.

Connection also argues that the Act does not comply with the part of the intermediate scrutiny test which requires that a regulation of protected expression leave open "ample alternative channels" for the communication. Related to this argument is the contention that the regulation interferes with the rights of Connection's readers to express themselves anonymously. Connection contends that a person wishing to publish a sexually explicit message without submitting identification documents that may be made available to the government no longer has a forum where he or she can publish that message anonymously.

Connection is correct that the Supreme Court has recognized that the right to communicate anonymously is encompassed within the First Amendment. In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), the Court struck down an ordinance prohibiting the anonymous distribution of political leaflets. The Court noted that "an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id.* at 342. Nonetheless, Connection's and its readers' First Amendment rights have not been violated.

First, Connection has defined the relevant channel of communication too narrowly. Connection claims that what is destroyed by the Act is a channel for anonymous, sexually explicit visual expression that does not require the submission of identification documents. However, the requirement that ample alternative channels be left available does not mean that there must be a channel where Connection and its readers can express themselves in precisely the same manner as before the regulation. *Cf. Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (noting that "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired"). Indeed, if there were an identical channel available for the communication, there likely would be no constitutional challenge.

If the relevant channel instead is defined merely as a forum for anonymous, sexually explicit visual expression, alternative channels clearly remain available. People who wish to submit sexually explicit photographs to Connection's magazines still may do so. These persons also may have their photographs *published* anonymously. All that has been restricted is their ability to *submit* their photographs without identification but not their right to express themselves, via their advertisements, anonymously. In point of fact, Connection's subscribers already were required to identify themselves and verify their ages to the magazines' editor. All that has changed is that documentation of age is required, and this information must be made available to the government if requested. Public disclosure of this information is neither required nor suggested by the terms of the Act. This condition of entry to this forum for anonymous, sexually explicit speech does not destroy the forum. Even assuming *arguendo* that Connection's readers

will be less likely to engage in this form of expression because of the fear of disclosure, this unsubstantiated fear, and not the act, is what is diminishing the forum. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989) ("mere assertion of some possible self-censorship resulting from a statue is not enough to render . . .[a] law unconstitutional").

In addition, this fear of disclosure argument is weakened by the fact that Connection's readers already have placed themselves at risk of losing the anonymity of their speech by submitting sexually explicit photographs of themselves to be published and distributed in Connection's magazine. Even if the majority of Connection's advertisers do ask to have their faces blocked out of the advertisements and identify themselves only through the code at the beginning of each message, they still are subjecting themselves to potential disclosure because anyone may respond to the advertisement and then discover the advertisers' identities. Likewise, advertisers already have been disclosing their identities to Connection, which could also subject them to at least some risk of public disclosure.

Furthermore, defining the forum even more broadly indicates that there are numerous "reasonable alternative avenues of communication" available for sexually explicit expression. *See City of Renton*, 475 U.S. at 53 (finding zoning ordinance which prohibited adult motion pictures from locating near residential zones left ample land available for theaters in other areas). Undocumented sexually explicit expression is permitted if the acts of sexual conduct are simulated or do not otherwise fall within the proscriptions of the Act. Obviously, documentation also is not required for photographs of subscribers who are merely nude, fully clothed,

or submit text-only messages. Connection's subscribers also may make use of its voice mailboxes for "swingers" and its service on the Internet. Therefore, subscribers who wish to engage in sexually explicit expression, without submitting documentation, still have alternative channels of communication available. Because the regulation at issue does not restrict the quantity or content of the expression, in the absence of any showing that the remaining channels of communication are inadequate, the requirement for alternative channels has been met. *See Ward*, 491 U.S. at 802. Therefore, as applied in this case, the Act does not impermissibly burden Connection's or its subscribers' free speech rights.

B. Prior Restraint

Connection argues that the Act operates as a prior restraint because advertisers must comply with the record-keeping provisions before they can publish their expression. Typically, "[t]he term prior restraint is used to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (citation and internal quotations omitted). Unlike this case, a prior restraint usually is alleged where a public official has been given discretionary power to deny use of a forum in advance of actual expression. *See Ward*, 491 U.S. at 795 n.5 (noting that most prior restraint cases have public officials with the power of pre-approval in common). Connection and its subscribers are not being forbidden from engaging in expressive activity in the future, but rather they potentially are being subjected to sanctions *following* their expressive activity – but only if they subsequently are found guilty of violating the

record-keeping provisions. Because there is a "well-established distinction between prior restraints and subsequent criminal punishments," *Alexander*, 509 U.S. at 548, the Act does not constitute a prior restraint. In addition, for the reasons discussed above, the Act does not constitute a prior restraint because of any alleged self-censorship or "chilling effect" that it may have on Connection's readers.

C. Freedom of Association

Connection argues that the Act violates the free association rights of its member by inhibiting their right to publish sexually explicit messages seeking to associate with others of like beliefs without coming forward and identifying themselves.

The first issue to address is whether Connection has *jus tertii*, or right of a third party, standing to assert this right of freedom of association on behalf of its readers. Although generally a party may not assert rights or interests of third parties, there are exceptions to this rule. *See Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 629 (1991). A litigant may raise a claim on behalf of a third party if the litigant can demonstrate that it has suffered a concrete, redressable injury, that it has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests. *Id.* Because Connection's own free speech rights are implicated, and it is directly subject to the strictures of the Act, Connection may challenge the Act on behalf of its readers, who are affected by the regulation of Connection's activities. *See Craig v. Boren*, 429 U.S. 190, 195 (1976) ("vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties

who seek access to their market or function"); *accord Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1394 (6th Cir. 1987).

Furthermore, even if Connection were attempting solely to assert its readers' rights and not its own, *jus tertii* standing would be appropriate under the facts of this case. When determining whether a party may assert the constitutional rights of others, a court must consider: (1) whether the relationship of the litigant to the third party is such that the litigant is an effective proponent of the rights of the third party; and (2) whether the third party is hindered in its ability to assert its own rights. *Singleton v. Wulff*, 428 U.S. 106, 114-16 (1976); *Planned Parenthood Ass'n of Cincinnati, Inc.*, 822 F.2d at 1394. In the present case, Connection properly may assert the First Amendment rights of its readers to remain anonymous in their speech and to freely associate with one another. Because a right to anonymity is at issue, "[t]o require that [the right] be claimed by the [readers] themselves would result in nullification of the right at the very moment of its assertion." *NAACP v. Alabama*, 357 U.S. 449, 459 (1958) (finding that NAACP could assert the right of its rank-and-file members not to be identified). Accordingly, Connection may assert the rights of its readers.

Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of freedom of speech. *NAACP*, 357 U.S. at 460. This freedom may be threatened if there is forced disclosure of an individual's membership in an organization. In *NAACP v. Alabama*, the Supreme Court held that the NAACP could not be forced to disclose its membership lists to the State of Alabama because disclosure would adversely affect the ability of its members to

collectively advocate and associate due to the fear of reprisals resulting from this disclosure. *Id.* at 462-63. The position of Connection's readership, however, is not analogous to that of the NAACP members. In NAACP, the Court noted the fact that the organization had made an uncontroverted showing that reprisals had occurred in the past when identity of the members had been disclosed. *Id.* at 462. Although Connection presented testimony that "swingers" have suffered reprisals when their lifestyles have been discovered by their communities, there has been no evidence offered that they will suffer reprisals from this information being disclosed only to the government.

Perhaps more importantly, Connection's readers' freedom to associate by means of its magazines is not significantly hindered by the Act. The readers still may associate freely and anonymously by submitting numerous types of messages and pictures for publication without providing documentation of name or age. Clearly, the right of the readers to freely associate with like-minded persons is not infringed by the presence of a record-keeping provision that applies only to a highly specific form of expression and requires potential disclosure only to the government. Accordingly, the free association rights of Connection's readers have not been violated.

IV. CONCLUSION

Accordingly, it is clear that Connection has not demonstrated a substantial likelihood of success on the merits of its claim that the Act and its implementing regulations violate the First Amendment rights of Connection and its

readers.[10] In addition, the other factors relevant to the granting of a preliminary injunction weigh against Connection's motion. The public has a strong interest in the enforcement of a likely constitutional statute would harm the government. Furthermore, Connection has not demonstrated that it will be irreparably injured absent the granting of an injunction. Accordingly, the district court did not abuse its discretion, and we hereby **AFFIRM** the district court's denial of the preliminary injunction and **VACATE** the stay pending appeal.

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[10] In analyzing the Act under a similar constitutional attack, the District of Columbia Circuit likewise has concluded that the aspect of the record-keeping provisions at issue in this case does not violate the First Amendment. *See American Library Ass'n v. Reno*, 33 F.3d 78 (D.C. Cir. 1994).

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CONNECTION DISTRIBUTING CO.	)	CASE NO. 1:95CV1993
	)	
Plaintiff,	)	
	)	
v.	)	Judge John M. Manos
	)	
THE HONORABLE JANET RENO,	)	MEMORANDUM OF
	)	OPINION
Defendant,	)	
	)	(Filed Jan. 16, 1997)

On September 13, 1995, Connection Distributing Company ("Connection"), plaintiff, filed the above captioned action against United States Attorney General Janet Reno, defendant, seeking declaratory and injunctive relief to prohibit enforcement of the Child Protection Restoration and Penalties Enhancement Act of 1990,[1] 18 U.S.C. §2257. Jurisdiction is predicated upon 28 U.S. C. §1331.

On September 13, 1995, Connection filed a Motion for Preliminary Injunction and requested an evidentiary hearing. On April 8 and 9, 1996, the Court held an evidentiary hearing at which witnesses and exhibits were presented. For the following reasons, the motion is DENIED.

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[1] Title III of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified at 18 U.S.C. §2257(1990)).

I. FACTS

A. Background Information

Connection is a Cleveland corporation that publishes sexually explicit "swinger" magazines.[2] The magazines consist, *inter alia*, of advertisements placed by individuals seeking to meet others in the swinging lifestyle. The ads, generally containing the author's biographical information, personal facts, and an identification number, are often accompanied by one or more explicit photographs. Individuals who wish to respond to an ad may submit a letter to Connection which, for a handling fee, will forward the correspondence to the person who placed the ad (the "author"). In this fashion, the identity of the author remains confidential.[3]

In 1990, Congress, in response to the difficulties faced by law enforcement officials in ascertaining the age of individuals contained in sexually explicit visual depictions, passed the Child Protection Restoration and Penalties Enhancement Act ("Act"), 18 U.S.C. §2257. The Act requires producers of material containing visual depictions of "actual sexually explicit

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[2] According to Patricia Prementine, Editor of Connection and a self-proclaimed swinger, "swinging" is "an alternative social and sexual lifestyle comprised mostly of mature adults who believe in sexual freedom and do not believe in sexual monogamy. [Swingers] allow their partners the freedom to experience sexual relationships with others." (Transcript at 4).

[3] While the identity of the author is not known to the general public, Connection has always required a person who wishes to place a personal ad to supply his or her legal name, address, and telephone number, and to affirm that he or she is over the age of twenty-one. See Plaintiff's Exhibit 9; see also Transcript at 17-18.

conduct"[4] to create and maintain records concerning the identity and age of all performers depicted.[5] 18 U.S.C. §2257(a). Producers must ascertain and record each performer's name (including any professional name, nickname, or alias used by such person) and date of birth. 18 U.S.C. §2257(b); see 28 C.F.R. §75.2(a). In addition, a legible copy of an identification document (*e.g.*, driver's license, passport, or state identification card) must be kept verifying the personal information of each performer. 28 C.F.R. §75.2(a)(1). Producers must maintain these records at their business premises and are required to make them available to the Attorney General for inspection at all reasonable times. 18 U.S.C. §2257(c); see 28 C.F.R. §§75.4 and 75.5. Further, each book, magazine, periodical, film or videotape covered by the Act must contain a conspicuous statement of the address at which the records are kept. 18 U.S.C. §2257(e); see 28 C.F.R. §75.6. Any producer who does not comply with the Act is subject to a fine and imprisonment for up to two years. 18 U.S.C. §2257(i).[6]

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[4] "Actual sexually explicit conduct" is defined as actual (*i.e.*, not simulated) "(A) sexual intercourse, including genital-genital, oral-genital, anal-genital, or oral-anal, whether between two person of the same or opposite sex; (B) bestiality; (C) masturbation; or (D) sadistic or masochistic abuse." 18 U.S.C. §2257(h)(1) (incorporating by reference 18 U.S.C. §2256(2)(A)-(D)).

[5] The Act applies equally to "primary" and "secondary" producers. 18 U.S.C. §2257(h)(3). The regulations define a "primary producer" as "any person who actually films, videotapes, or photographs a visual depiction of actual sexually explicit conduct," whereas a "secondary producer" is "any person who produces, assembles, manufactures, publishes, duplicates, reproduces or reissues a book, magazine, periodical, film, videotape or other matter intended for commercial distribution that contains a visual depiction of actual sexually explicit conduct." 28 C.F.R. §75.1(c)(1) and (2).

[6] Repeat offenders may be imprisoned for up to five years. 18 U.S.C. §2257(i).

On September 13, 1995, Connection filed the above captioned action seeking declaratory and injunctive relief to prohibit enforcement of the Act. Count One alleges that the Act, as applied to Connection, violates the First Amendment, in that it (a) suppresses free speech; (b) represents a prior restraint; (c) chills protected speech; and (d) is overbroad. In Count Three, Connection invokes the theory of "associational standing" and asserts the same constitutional violations on behalf of those persons who wish to place personal ads. See e.g., N.A.A.C.P. v. Alabama, 357 U.S. 449, 458-60 (1957) (organization has standing to assert the constitutional rights of its members where sufficient nexus of interests exists).[7]

B. Evidence Presented at the Hearing

On April 8 and 9, 1996, the Court held an evidentiary hearing on the Motion for Preliminary Injunction. Both parties called witnesses and introduced exhibits into evidence.

Patricia Prementine, Editor of Connection for twelve years, testified that since 1986, Connection has only published personal advertisements for persons over twenty-one years of age. (Transcript at 17.) Individuals wishing to submit ads must affirm, under penalty of perjury, that they are over twenty-one years of age and sign the back of each photograph submitted. (Id. at 17-18.) Upon receipt, she reviews the completed advertisement placement form, any photographs, the proposed text of the ad, and the method of payment to ensure that the person submitting the ad is over twenty-one. (Id. at 18.) If she

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[7] Counts Two and Four merely restate the allegations of Counts One and Three, respectively, and request that the Court order declaratory and injunctive relief.

has any doubt as to an individual's age, she requests further identification information to verify his or her age.[8] (Id. at 19.)

In January 1995, Connection began its effort to comply with the statutory and regulatory mandates of the Act.[9] (Id. at 23.) It sent a letter to its readership, entitled "Important Notice to Advertisers," in which it explained that readers wishing to submit sexually explicit photographs were now required to submit a legible copy of (1) a driver's license, state identification card, or passport; and (2) a second form of identification, such as a social security card or an insurance card. (Id. at 23-25; see Plaintiff's Exhibit 11.) Connection also modified its form for placing a personal ad to include information required under the Act. (Transcript at 24; see Plaintiff's Exhibit 10.)

Connection alleges that as a result of these compliance attempts, the number of submissions to its magazines

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[8] Prementine testified that she reviewed all photographs submitted, not merely those that were published, and thus had adequate opportunity to verify the age of the person depicted. In addition, she stressed that she reviewed the photographs before they were scanned; *i.e.*, the submissions she viewed were clearer and of a higher quality than they appeared after scanning and publication. (Id. at 18, 21.)

[9] Originally passed in 1990, the Act was subject to immediate constitutional attack, and remained so for years of protracted litigation. See American Library Ass'n v. Thornburgh, 713 F.Supp. 469 (D.D.C. 1989) (holding prior version of Act unconstitutional), vacated sub nom. American Library Ass'n v. Barr, 956 F.2d 1178 (D.C. Cir. 1992) (vacating judgment in light of new amendment), on remand, 794 F.Supp. 412 (D.D.C. 1992) (holding Act with new amendments unconstitutional), rev'd sub nom. American Library Ass'n v. Reno, 33 F.3d 78 (D.C. Cir. 1994) (reversing district court and finding Act constitutional), cert. denied, 115 S.Ct. 2610 (1995). Accordingly, Connection did not attempt to comply with the Act until its validity had been upheld and the Attorney General put publishers on notice that it intended to begin enforcement efforts.

drastically declined. (Transcript at 26.) Prementine testified that prior to January 1995, Connection customarily received between one hundred to two hundred submissions per issue.[10] (Id. at 22.) In contrast, since July 1995 to present date, Connection received only 137 submissions with proper identification to be distributed throughout the 34 issues published.[11] (Id. at 27.) Prementine claimed that Connection was forced to drop two of its magazines, and to "recycle" old ads in the remaining six titles. (Id. at 29.) Further, Connection eliminated most of the color pages, reduced the size of its magazines, increased the amount of commercial advertising, and otherwise reduced quality in order to save costs resulting from the drop in submission. (Id. at 30.) Prementine opined that this drop in submission was "due to the fact that [the] readership is so terrified of being exposed," and concluded that Connection could not survive if it continued to comply with the Act. (Id. at 28, 32.)

Connection's only other witness was Robert L. McGinley, an "expert" in the swinging lifestyle.[12] McGinley, chief executive

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[10] Prior to 1995, Connection published eight sexually explicit magazines on a bimonthly or quarterly basis (depending on title). (Id. at 14-16.)

[11] Prementine also testified that in July 1995, Connection was forced to "black out" portions of 477 explicit photographs in its magazines because it did not have proper identification for those depicted. (Id. at 26.) Connection sent out letters to those who placed the ads and requested the necessary documentation. (Id.) Of the 477 letters sent, Connection to date received only 30 responses. (Id. at 27.) Prementine testified that this lack of response (taken in conjunction with the decline in submissions) was evidence that swingers, fearful of exposing their identities to the government, were engaging in self-censorship. (Id. at 28.)

[12] McGinley holds a Masters and Doctorate Degree in counseling psychology from Newport International University, although he never became licensed

(continued...)

officer of L.S.O., Limited, a California corporation that caters to swingers, testified that privacy is of "paramount importance" to those engaged in the lifestyle. (Id. at 139.) After recounting a personal experience when he allegedly lost his job due to "swinging,"[13] he claimed that swingers generally fear governmental exposure and intervention. (Id. at 140.) He testified that based upon his personal experience at least 90% of swingers are over the age of thirty, although some are in their twenties.[14] Finally, he concluded that the "great majority" of swingers, due to their fear of governmental reprisal, would cease publishing advertisements if forced to comply with the identification mandates of the Act. (Id. at 142.)

The government's sole witness was Dr. Frank M. Biro, M.D.,

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[12](...continued)
in, nor pursued the profession of, psychology. (Id. at 126.) He has been involved in the corporate aspects of swinging since 1969, but personally engaged in the lifestyle prior to that. (Id. at 127.) He is co-author of the book The Other Americans with Dr. Edgar W. Butler, Chairman of the Department of Psychology at the University of California Riverside Campus. (Id. at 133.) In addition, McGinley has authored numerous articles for national magazines, has appeared on several hundred television and radio programs on the subject of "swinging," and has had personal contact with swingers throughout the country for the past twenty to twenty-five years. (Id. at 135.)

[13] In 1969, McGinley was employed by Bendix Corporation as a Senior Service Engineer, where he taught United States military airlift command pilots to use the automatic landing system on the Landheed C141A aircraft. As part of his job, he had government security clearance. While working at Bendix, he answered an advertisement in a swingers magazine and began corresponding through sexually explicit letters with a woman in northern California, who he later found out was married to a United States Air Force Sergeant. McGinley testified that the Air Force, through means unknown, obtained one of the letters he had written and voided his security clearance, preventing him from working. (Id. at 128-29.)

[14] He also testified that he had never seen or heard of a minor engaging in the "swinging" lifestyle. (Id. at 139.)

a specialist in the Adolescent Medicine Division at Children's Hospital Medical Center in Cincinnati.[15] Dr. Biro testified that he had reviewed six magazines published by Connection in 1994 and identified three photographs where the person depicted could be under the age of eighteen. (Id. at 87.) He further testified that several photographs provided insufficient visual clues to determine the age of the individual. (Id. at 93-94.)

On cross-examination, Connection highlighted several inconsistencies between Dr. Biro's testimony at the hearing and the conclusions contained in his expert report. (id. at 99-115.) In addition, Dr. Biro acknowledged that the field of pubertal maturation was not an exact science and was not studied to ascertain the age of an individual. (Id. at 98.) Finally, Connection elicited that Dr. Biro, when reviewing the magazines, had mistakenly thought that the legal age of majority was twenty-one rather than eighteen. (Id. at 99-100.)

II. STANDARD OF REVIEW

In determining whether to grant a motion for preliminary injunction, the Court considers four factors:

> (1) the likelihood that the parties seeking the preliminary injunction will succeed on the merits of the claim; (2) whether the party seeking the injunction will suffer

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[15] Dr. Biro is the Director of Clinical Affairs in the Division of Adolescent Medicine. He also is the Director of the combined internal medicine/pediatrics residency program. He co-authored a recent growth and health study for the National Heart, Lung and Blood Institute and has published numerous articles in peer review journal on the subject of pubertal maturation. (Id. at 70-80.)

irreparable harm without the grant of the extraordinary relief; (3) the probability that granting the injunction will cause substantial harm to others; and (4) whether the public interest is advanced by the issuance of the injunction.

Dayton Area Visually Impaired Persons, Inc. v. Fisher, 70 F.3d 1474, 1480 (6th Cir. 1995) (quoting Washington v. Reno, 35 F.3d 1093, 1099 (6th Cir. 1994)), cert. denied, 116 S.Ct. 1421 (1996). All four factors need not support the decision. Women's Medical Professional Corp. v. Voinovich, 911 F.Supp. 1051, 1059 (S.D. Ohio 1995). Rather, the factors are intended to help guide the Court in balancing the equities of the case. In re Eagle-Picher Indus., Inc., 963 F.2d 855, 859 (6th Cir. 1992).

III. ANALYSIS

Connection has not established a substantial likelihood of success on the merits. Despite repeated challenges,[16] the Act has been upheld against similar constitutional attack. American Library Ass'n v. Reno ("ALA"), 33 F.3d 78 (D.C. Cir. 1994), cert. denied, 115 S.Ct. 2610 (1995). In ALA, the United States Court of Appeals for the District of Columbia Circuit held that the Act was a content-neutral, narrowly tailored statute that passed constitutional muster. Id. at 84-88. Nothing in the evidence leads this Court to conclude that this decision should be distinguished.[17]

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[16]See supra n.9.

[17]This conclusion holds true even in light of the additional authority offered by Connection. On June 28, 1996, Connection filed a Motion for Leave to File Supplemental Authority, offering the decision of ACLU v. United States, 929

(continued...)

Connection has indeed demonstrated a significant decline in submissions to its magazines following its attempts to comply with the Act. However, even assuming *arguendo* a causal relationship between the two (*i.e.*, that the compliance efforts proximately caused the drop in submissions), the possibility of "self-censorship" is not enough to render a statute unconstitutional. Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 60 (1989). Moreover, Connection's argument that its own internal procedures ensure that minors are not depicted in its magazines is misplaced. The evidence presented at the hearing demonstrates the subjective and imprecise nature of

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[17](...continued)
F. Supp. 824 (E.D. Pa. 1996). On July 23, 1996, Connection filed a Second Motion for Leave to File Supplement Authority, offering the recent Supreme Court decision of Denver Area Telecommunication Consortium, Inc. v. FCC, 116 S.Ct 2374 (1996). The government opposed both motions.

For purposes of the record, both motions are hereby granted. The Court has considered the above decisions in reaching its decision. Both the ACLU and Denver decisions can be readily distinguished. The most obvious distinction is that different statutes were reviewed: The ACLU court struck down a portion of the Communications Decency Act of 1996, 110 Stat. 56 (to be codified at 47 U.S.C. §223(a)-(h)), legislation aimed at prohibiting, *inter alia*, the dissemination of "indecent" or "patently offensive" materials to minors over the computer internet; and in Denver, the Court reviewed the constitutionality of the Cable Television Consumer Protection Act of 1992, 106 Stat. 1486, §10(a)-(c) (codified at 47 U.S.C. §532(h)-(j)), a statute concerning "indecent" or "patently offensive" programming on cable systems. Neither statute was designed to address the problem of child pornography, as was the Act here, and neither court had reason to review recordkeeping requirements or any analogous provision to those here at issue. Further, Connection cannot point to a rule of law established by ACLU or Denver, for neither decision provides a majority opinion. In ACLU, each of the three panel judges found the Act to be unconstitutional; however, each so found for different independent reasons and each wrote a separate opinion. Similarly, Denver represents a plurality decision, with six Justices writing separately, and even the plurality could not agree on the appropriate level of scrutiny to apply to the Act.

The Court finds that, even in light of the ACLU and Denver decisions, Connection has not shown a likelihood of success on the merits.

determining a person's age from looking at a number of photographs.[18] More importantly, in deciding whether a statute is prohibited by the First Amendment, the Court must determine whether the statute is sufficiently tailored in relation to the overall problem legislated against (here, child pornography), not whether the statute is sufficiently tailored with regard to a single operation. See Ward v. Rock Against Racism, 491 U.S. 781, 801 (1989). Thus, even were Connection's internal procedures guaranteed to prevent the depiction of minors in its magazines, the analysis would not change.

As to the second factor, while Connection has demonstrated economic loss, it has not shown a constitutional violation that would constitute irreparable harm. The government would be substantially harmed if enforcement of a constitutional law aimed at combating child pornography were enjoined, and the public interest dictates that constitutional laws be applied.

Accordingly, Connection's Motion for a Preliminary Injunction is DENIED.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

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[18]At the hearing, Connection, in an attempt to discredit the government's expert, established that the field of pubertal maturation is not an exact science and cannot be used to predict the age of individuals. If Dr. Biro, a specialist who has performed hundreds of physical examinations on adolescents, cannot determine the age of a person by examining a photograph, the Court questions how Prementine, without any formal training in biology or human development, can effectively "screen" submissions to ensure that no minors are depicted.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CONNECTION DISTRIBUTING CO.,	)	CASE NO. 1:95CV1993
	)	
Plaintiff,	)	Judge John M. Manos
	)	
v.	)	
	)	
THE HONORABLE JANET RENO,	)	*ORDER*
	)	
Defendant.	)	
	)	(Filed Jan. 16, 1997)

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the Motion for Leave to File Supplemental Authority and the Second Motion for Leave to File Supplemental Authority are GRANTED; the Motion for Preliminary Injunction is DENIED.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CONNECTION DISTRIBUTING CO.,	)	CASE NO. 1:95CV1993
	)	
Plaintiff,	)	Judge John M. Manos
	)	
v.	)	
	)	
THE HONORABLE JANET RENO,	)	*MEMORANDUM OF*
	)	*OPINION*
Defendant.	)	
	)	(Filed Feb. 14, 1997)

On September 13, 1995, Connection Distributing Company ("Connection"), plaintiff, filed the above-captioned action against United States Attorney General Janet Reno, defendant, seeking declaratory and injunctive relief to prohibit enforcement of the Child Protection Restoration and Penalties Enhancement Act of 1990 ("Act"),[1] 18 U.S.C. §2257.

On April 8-9, 1996, the Court conducted a hearing on Connection's Motion for Preliminary Injunction. On January 16, 1997, the Court issued its Memorandum of Opinion denying the motion. On January 21, 1997, Connection filed an interlocutory appeal.

On January 24, 1997, Connection filed a motion pursuant to Federal Rule of Civil Procedure 62(c) requesting the Court to

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[1]Title III of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified at 18 U.S.C. §2257 (1990)).

enjoin enforcement of the Act against it pending resolution of the appeal. On February 7, 1997, the government responded, opposing the motion.

For the following reasons, the Motion for Injunction Pending Appeal is GRANTED.

I.

In determining whether to grant a stay under Federal Rule of Civil Procedure 62(c), the Court applies the same four factors as when considering a motion for a preliminary injunction: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the stay is granted; and (4) the public interest in granting the stay. Michigan Coalition of Radioactive Material Users v. Griepentrog, 945 F. 2d 150, 153 (6th Cir. 1991).

"Although the factors to be considered are the same for both a preliminary injunction and a stay pending appeal, the balancing process is not identical due to the different procedural posture in which each judicial determination arises." Id. The party moving for a stay need not establish that it is probable that they will succeed on appeal. Dayton Christian Schools v. O.C.R.C., 604 F. Supp. 101, 103 (S.D. Ohio 1984). Instead, the probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury the movant would suffer absent the stay. Griepentrog, 945 F.2d at 153.

II.

Applying the four factors to this action, the Court concludes that a stay should be granted. While confident that its decision will be affirmed on appeal, this case "involves substantial legal questions in the area of the law that continues to evolve." Thiry v. Carlson, 891 F. Supp. 563, 566 (D. Kan. 1995). The Act has been subject to protracted constitutional attack with courts reaching conflicting results. See American Library Ass'n v. Thornburgh, 713 F. Supp. 469 (D.D.C. 1989) (holding prior version of Act unconstitutional), vacated sub nom. American Library Ass'n v. Barr, 956 F.2d 1178 (D.C. Cir. 1992) (vacating judgment in light of new amendments), on remand, 794 F.Supp. 412 (D.D.C. 1992) (holding Act with new amendments unconstitutional), rev'd sub nom. American Library Ass'n v. Reno, 33 F.3d 78 (D.C. Cir. 1994) (reversing district court and finding Act constitutional), cert. denied, 115 S.Ct. 2610 (1995). Connection, although not likely successful, has support for its position on appeal.

More importantly, Connection has shown that it would be irreparably harmed absent an injunction. Testimony was introduced at the preliminary injunction hearing that once compliance efforts were instituted, magazine submissions declined to such extent that the continuing vitality of the company is in jeopardy. See also Affidavit of Rondee Kamis, attached to *Motion for Injunction Pending Appeal* as Exhibit A, at ¶ 6. To deny the stay may well result in Connection's demise, and were this to occur, any victory on appeal would have little affect.

The Court also finds that an injunction, if issued, would not substantially harm others. Uncontroverted testimony at the hearing established that very few (if any) minors engaged in the "swinging" lifestyle to which Connection and its

publications appeal. Moreover, the scope of the injunction is limited: the government would be enjoined only from enforcing the Act against this publisher for the short period of time necessary to consider the merits of the appeal.

Finally, issuing an injunction is consistent with public policy. While the public has a strong interest in applying laws aimed at preventing child pornography, it has an equally strong interest in preserving the legitimate exercise of free speech protected by the First Amendment. An injunction of limited scope represents the proper balance between these competing interests.

Accordingly, the Motion for Injunction Pending Appeal is GRANTED.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CONNECTION DISTRIBUTING CO.,	)	CASE NO. 1:95CV1993
	)	
Plaintiff,	)	Judge John M. Manos
	)	
v.	)	
	)	
THE HONORABLE JANET RENO,	)	*ORDER*
	)	
Defendant.	)	(Filed Feb. 14, 1997)

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the Motion for Injunction Pending Appeal is GRANTED.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CONNECTION DISTRIBUTING CO.,	)	CASE NO. 1:95CV1993
	)	
Plaintiff,	)	Judge John M. Manos
	)	
v.	)	
	)	
THE HONORABLE JANET RENO,	)	*MEMORANDUM OF*
	)	*OPINION*
Defendant.	)	
	)	(Filed Oct. 24, 1995)

On September 13, 1995, Connection Distributing Company ("Connection"), plaintiff, filed the above captioned action against Janet Reno, defendant, seeking declaratory and injunctive relief that would prohibit enforcement of the Child Protection Restoration and Penalties Enhancement Act of 1990, 18 U.S.C. §2257. Jurisdiction is predicated upon 28 U.S.C. §1331.

Also on September 13, 1995, Connection filed a Motion for a Temporary Restraining Order, and on September 20, 1995, the government responded. For the following reasons, the motion is denied.

I. FACTS

The Child Protection Restoration and Penalties

Enhancement Act of 1990 ("Act")[1] requires producers of matters containing visual depictions of "actual sexually explicit conduct" to create and maintain records concerning the age and identity of all performers depicted. In addition, producers are required to label each depiction with a statement outlining where records are kept. The purpose of the Act is to alleviate difficulty for law enforcement officials in ascertaining whether an individual in a sexually explicit visual depiction is above the age of majority.

Connection asserts that it publishes constitutionally protected, sexually explicit adult magazines. The magazines contain photographs placed by individuals seeking to meet other individuals. Since anonymity is desired by those persons who submit their ads, Connection keeps names and addresses in strict confidence. Any reader who wishes to respond to an ad must send a letter to Connection, who, for a handling fee, will forward the correspondence to the author of the ad.

Under the Act, Connection must maintain records for each individual who submits an ad containing an actual sexually explicit depiction. In January, 1995, Connection mailed a letter to individuals who had submitted ads in the past informing them of the Act. As a result, Connection alleges that submissions to its magazines have dropped. It asserts that the Act abridges its rights under the First Amendment.

II. STANDARD FOR A TEMPORARY RESTRAINING ORDER

In determining whether to grant a temporary restraining

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[1]Title III of the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified at 18 U.S.C. §2257 (1990)).

order, a Court considers four factors: (1) whether the movant has established a substantial likelihood of success on the merits; (2) whether there is a threat of irreparable injury to the movant; (3) whether granting the injunction will inflict harm on other parties; and (4) whether the public's interest is served by granting injunctive relief. N.A.A.C.P. v. City of Mansfield, 866 F.2d 162, 166 (6th Cir. 1989) (quoting Mason County Medical Ass'n v. Knebel, 563 F.2d 256, 261 (6th Cir. 1977)).

III. ANALYSIS

Connection has not established a substantial likelihood of success on the merits. The United State Court of Appeals for the District of Columbia Circuit recently upheld the Act against a similar constitutional challenge. American Library Assoc. v. Reno, 33 F.3d 78 (D.C. Cir. 1994), cert. denied, 115 S.Ct. 2610 (1995). Although Connection attempts to distinguish the decision, the Court finds that the likelihood of success on the merits is not sufficient to merit the relief it requests. Accordingly, its Motion for a Temporary Restraining Order is denied.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CONNECTION DISTRIBUTING CO.,	)	CASE NO. 1:95CV1993
	)	
Plaintiff,	)	Judge John M. Manos
	)	
v.	)	
	)	
THE HONORABLE JANET RENO,	)	*ORDER*
	)	
Defendant.	)	(Filed Oct. 24, 1995)

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the Motion for a Temporary Restraining Order is denied.

IT IS SO ORDERED.

/s/ John M. Manos
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CONNECTION DISTRIBUTING CO.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
THE HONORABLE JANET RENO,	)	*ORDER*
	)	
Defendant-Appellee	)	(Filed Oct. 22, 1998)

BEFORE: NORRIS and CLAY, Circuit Judges; and BORMAN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Clerk

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*Hon. Paul D. Borman, United States District Judge for the Eastern District of Michigan, sitting by designation.

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

TITLE 18 U.S.C. § 2257
RECORD KEEPING REQUIREMENTS

(a) Whoever produces any book, magazine, perio dical, film, videotape, or other matter which--

(1) contains one or more visual depictions made after November 1, 1990 of actual sexually explicit conduct; and

(2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction.

(b) Any person to whom subsection (a) applies shall, with respect to every performer portrayed in a visual depiction of actual sexually explicit conduct --

(1) ascertain, by examination of an identification document containing such information, the performer's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by regulations;

(2) ascertain any name, other than the

performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name; and

(3) record in the records required by subsection (a) the information required by paragraphs (1) and (2) of this subsection and such other identifying information as may be prescribed by regulation.

(c) Any person to whom subsection (a) applies shall maintain the records required by this section at his business premises, or at such other place as the Attorney General may by regulation prescribe and shall make such records available to the Attorney General for inspection at all reasonable times.

(d)(1) No information or evidence obtained from records required to be created or maintained by this section shall, except as provided in this section, directly or indirectly, be used as evidence against any person with respect to any violation of law.

(2) Paragraph (1) of this subsection shall not preclude the use of such information or evidence in a prosecution or other action for a violation of this section or for a violation of any applicable provision of law with respect to the furnishing of false information.

(e)(1) Any person to whom subsection (a) applies shall cause to be affixed to every copy of any matter described in paragraph (1) of subsection (a) of this

section, in such manner and in such form as the Attorney General shall by regulations prescribe, a statement describing where the records required by this section with respect to all performers depicted in that copy of the matter may be located.

(2) If the person to whom subsection (a) of this section applies is an organization the statement required by this subsection shall include the name, title, and business address of the individual employed by such organization responsible for maintaining the records required by this section.

(f) it shall be unlawful --

(1) for any person to whom subsection (a) applies to fail to create or maintain the records as required by subsections (a) and (c) or by any regulation promulgated under this section;

(2) for any person to whom subsection (a) applies knowingly to make any false entry in or knowingly to fail to make an appropriate entry in, any record required by subsection (b) of this section or any regulation promulgated under this section;

(3) for any person to whom subsection (a) applies knowingly to fail to comply with the provisions of subsection (e) or any regulation promulgated pursuant to that subsection; and

(4) for any person to knowingly sell or otherwise transfer, or offer for sale or transfer, any book,

magazine, periodical, film, video, or other matter, produce in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce or which is intended for shipment in interstate or foreign commerce which --

(A) contains one or more visual depictions made after the effective date of this subsection of actual sexually explicit conduct; and

(B) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce, or is shipped or transported or is intended for shipment or transportation in interstate or foreign commerce;

which does not have affixed thereto, in a manner prescribed as set forth in subsection (e)(1), a statement describing where the records required by this section may be located, but such person shall have no duty to determine the accuracy of the contents of the statement or the records required to be kept.

(g) The Attorney General shall issue appropriate regulations to carry out this section.

(h) As used in this this section --

(1) the term "actual sexually explicit conduct" means actual but not simulated conduct as defined in subparagraphs (A) through (D) of paragraph (2)

of section 2256 of this title;

(2) "identification document" has the meaning given that term in section 1028(d) of this title;

(3) the term "produces" means to produce, manufacture, or publish any book, magazine, periodical, film, video tape or other similar matter and includes the duplication, reproduction, or reissuing of any such matter, but does not include mere distribution or any other activity which does not involve hiring, contracting for, managing, or otherwise arranging for the participation of the performers depicted; and

(4) the term "performer" includes any person portrayed in a visual depiction engaging in, or assisting another person to engage in, actual sexually explicit conduct.

(i) Whoever violates this section shall be imprisoned for not more than 2 years, and fined in accordance with the provisions of this title, or both. Whoever violates this section after having been convicted of a violation punishable under this section shall be imprisoned for any period of years not more than 5 years but not less than 2 years, and fined in accordance with the provisions of this title, or both.

28 C.F.R. PART 75
CHILD PROTECTION RESTORATION AND PENALTIES ENHANCEMENT ACT OF 1990; RECORD-KEEPING PROVISIONS

§75.1 Definitions.

(a) Terms used in this part shall have the meanings set forth in 18 U.S.C. 2257.

1. (b) *Picture identification card* shall mean a document issued by a government entity or by a private entity, such as a school or a private employer, that bears the photograph and the name of the individual identified. A picture identification card may be a passport, driver's license, work identification card, school identification card, selective service card, or identification card issued by a state.

(c) *Producer* means any person, including any individual, corporation, or other organization, who is a *primary producer* or a *secondary producer*.

(1) A *primary producer* is any person who actually films, videotapes, or photographs a visual depiction of actual sexually explicit conduct.

(2) A *secondary producer* is any person who produces, assembles, manufactures, publishes, duplicates, reproduces, or reissues a book, magazine, periodical, film, videotape, or other matter intended for commercial distribution that contains a visual depiction of actual sexually explicit conduct.

(3) The same person may be both a primary and a secondary producer.

(4) *Producer* does not include persons whose activities relating to the visual depiction of actual sexually explicit conduct are limited to the following:

(i) Photo processing;

(ii) Distribution; or

(iii) Any activity, other than those activities identified in paragraphs (c)(1) and (2) of this section, that does not involve the hiring, contracting for, managing, or otherwise arranging for the participation of the depicted performers.

(d) *Sell, distribute, redistribute*, and *release* refer to commercial distribution of a book, magazine, periodical, film, videotape, or other matter that contains a visual depiction of actual sexually explicit conduct, and does not refer to noncommercial distribution of the such matter, including transfers conducted by lending libraries.

(e) *Copy*, when used in reference to an identification document or a picture identification card, means a photocopy or a photograph.

§75.2 Maintenance of records.

(a) Any producer of any book, magazine, periodical, film, videotape, or other matter that contains one or more visual depictions of actual sexually explicit conduct made after November 1, 1990 shall, for each performer portrayed in such visual depiction, create and maintain records containing the

following:

(1) The legal name and date of birth of each performer, obtained by the producer's examination of an identification document, as defined by 18 U.S.C. 1028(d). For any performer portrayed in such a depiction made after May 26, 1992, the records shall also include a legible copy of the identification document examined and, if that document does not contain a recent and recognizable picture of the performer, a legible copy of a picture identification card.

(2) Any name, other than each performer's legal name, ever used by the performer, including the performer's maiden name, alias, nickname, stage name, or professional name. For any performer portrayed in such a depiction made after May 26, 1992, such names shall be indexed by the title or identifying number of the book, magazine, film, videotape, or other matter.

(b) A producer who is a secondary producer as defined in §75.1(c) may satisfy the requirements of this part to create and maintain records by accepting from the primary producer, as defined in §75.1(c), copies of the records described in paragraph (a) of this section. Such a secondary producer shall also keep records of the name and address of the primary producer from whom he received copies of the records.

(c) The information contained in the records required to be created and maintained by this part need be current only as of the time the primary producer actually films, videotapes, or photographs the visual depiction of actual sexually explicit conduct. If the producer subsequently produces an additional book, magazine, film, videotape or other matter that contains one or more visual depiction of actual sexually explicit conduct

made by a performer for whom he maintains records as required by this part, the producer may add the additional title and/or identifying number and the names of the performer to the existing records maintained pursuant to §75.2(a)(2).

§75.3 Categorization of records.

2. Records required to be maintained under this part shall be categorized and retrievable to: All name(s) of each performer, including any alias, maiden name, nickname, stage name or professional name of the performer; and according to the title, number, or other similar identifier of each book, magazine, periodical, film, videotape, or other matter. Only one copy of each picture of a performer's picture identification card and identification document must be kept as long as each copy is categorized and retrievable according to any name, real or assumed, used by such performer, and according to any title or other identifier of the matter.

§75.4 Location of records.

Any producer required by this part to maintain records shall make such records available at the producer's place of business. The business address shall refer to a street address and not to a post office box number. Such records shall be maintained as long as the producer remains in business. If the producer ceases to carry on the business, the records shall be maintained for five years thereafter. If the producer produces the book, magazine, periodical, film, videotape or other matter as part of his control of or through his employment with an organization, records shall be made available at the organization's place of business. If the organization is

dissolved, the individual who was responsible for maintaining the records on behalf of the organization, as described in §75.6(b), shall continue to maintain the records for a period of five years after dissolution.

§75.5 Inspection of records.

Any producer required by this part to maintain records shall make such records available to the Attorney General or his delegee for inspection at all reasonable times.

§75.6 Statement describing location of books and records.

Any producer of any book, magazine, periodical, film, videotape, or other matter that contains one or more visual depictions of actual sexual explicit conduct made after November 1, 1990, and produced, manufactured, published, duplicated, reproduced, or reissued on or after May 26, 1992 shall cause to be affixed to every copy of the matter a statement describing the location of the records required by this part. A producer may cause such statement to be affixed, for example, by instructing the manufacturer of the book, magazine, periodical, film, videotape, or other matter to affix the statement.

(a) Every statement shall contain:

(1) The title of the book, magazine, periodical, film, or videotape, or other matter (unless the title is prominently set out elsewhere in the book, magazine, periodical, film, or videotape, or other matter) or, if there is no title, an identifying number or similar identifier which differentiates this matter from other matters which the producer has produced;

(2) The date of production, manufacture, publication, duplication, reproduction, or reissue of the matter; and,

(3) A street address at which the records required by this part may be made available. The street address may be an address specified by the primary producer or, if the secondary producer satisfies the requirements of §75.2(b), the address of the secondary producer.

(b) If the producer is an organization, the statement shall also contain the name, title, and business address of the individual employed by such organization who is responsible for maintaining the records required by this part.

(c) The information contained in the statement must be accurate as of the date on which the book, magazine, periodical, film, videotape, or other matter is sold, distributed, redistributed, or rereleased.

§75.7 Exemption Statement.

(a) Any producer of any book, magazine, periodical, film, videotape, or other matter may cause to be affixed to every copy of the matter a statement attesting that the matter is not covered by the record-keeping requirements of 18 U.S.C. 2257(a)-(c) and of this part if:

(1) The matter contains only visual depictions of actual sexually explicit conduct made before November 1, 1990, or is produced, manufactured, published, duplicated, reproduced, or reissued before May 26, 1992;

(2) The matter contains only visual depictions of simulated sexually explicit conduct; or,

(3) The matter contains only some combination of the visual depictions described in paragraph (a)(1) and (a)(2) of this section.

(b) If the primary producer and the secondary producer are different entities, the primary producer may certify to the secondary producer that the visual depictions in the matter satisfy the standards under paragraphs (a)(1) through (a)(3) of this section. The secondary producer may then cause to be affixed to every copy of the matter a statement attesting that the matter is not covered by the record-keeping requirements of 18 U.S.C. 2257(a)-(c) and of this part.

§75.8 Location of the statement.

All books, magazines, and periodicals shall contain the statement required in §75.6 or suggested in §75.7 either on the first page that appears after the front cover or on the page on which copyright information appears. In any film or videotape which contains end credits for the production, direction, distribution, or other activity in connection with the film or videotape, the statement referred to in §75.6 or §75.7 shall be presented at the end of the end titles or final credits and shall be displayed for a sufficient duration to be capable of being read by the average viewer. Any other film or videotape shall contain the required statement within one minute from the start of the film or videotape, and before the opening scene, and shall display the statement for a sufficient duration to be read by the average viewer. For all other categories not otherwise mentioned in this section, the statement is to be prominently displayed consistent with the manner of display required for the aforementioned categories.